

United States
Circuit Court of Appeals
For the Ninth Circuit.

MOUNT TIVY WINERY, INC., a Corporation,	Appellant,
vs.	
JOHN V. LEWIS, Collector of Internal Revenue, First California Dis-	
trict, and UNITED STATES OF AMERICA,	Appellees.
CALIFORNIA WINERIES AND DISTILLERIES, INC., a Corporation,	
Appellant,	
vs.	
JOHN V. LEWIS, Collector of Internal Revenue, etc., and	
UNITED STATES OF AMERICA,	Appellees.
FRESNO WINERY, INC., a Corporation, etc.,	Appellant,
vs.	
JOHN V. LEWIS, Collector of Int. Revenue, et al.,	Appellees.
SANTA LUCIA WINERIES, INC., a Corporation,	Appellant,
vs.	
JOHN V. LEWIS, Collector of Int. Revenue, et al.,	Appellees.
CHARLES DUBBS and SAMUEL CAPLAN, Co-partners doing business	
as ALTA WINERY AND DISTILLERY,	Appellants,
vs.	
JOHN V. LEWIS, Collector of Int. Revenue, et al.,	Appellees.
CALIFORNIA GROWERS WINERIES, INC., a Corporation,	
Appellant,	
vs.	
JOHN V. LEWIS, Collector of Int. Revenue, et al.,	Appellees.
ST. GEORGE WINERY, a Corporation,	Appellant,
vs.	
JOHN V. LEWIS, Collector of Int. Revenue, et al.,	Appellees.

FILED

Transcript of Record

SEP 15 1942

PAUL P. O'BRIEN,
CLERK

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

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Upon Appeals from the District Court of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorney for Defendant and Appellee

In the Southern Division of the United States District Court for the Northern District of California.

No. 20473-S

MOUNT TIVY WINERY, INC., a California Corporation,

Plaintiff

v.

JOHN V. LEWIS, COLLECTOR OF INTERNAL REVENUE, FIRST CALIFORNIA DISTRICT, JOHN DOE, COLLECTOR OF INTERNAL REVENUE, FIRST CALIFORNIA DISTRICT, UNITED STATES OF AMERICA, FIRST DOE, SECOND DOE AND THIRD DOE,

Defendants.

COMPLAINT FOR REFUND OF TAXES PAID ERRONEOUSLY AND ILLEGALLY COLLECTED

Plaintiff complains of defendants, and for cause of action against defendants, alleges:

I.

That the defendants John Doe, First Doe, Second Doe and Third Doe, are the fictitious names of defendants sued herein whose true names are to the plaintiff unknown, and plaintiff asks that when such true names are ascertained this complaint may be amended by inserting such true names in the place and stead of such fictitious names.

II.

That at all times herein mentioned, plaintiff Mount Tivy Winery, Inc., was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, with a principal place of business at Fresno, County of Fresno, State of California.

III.

That at all times herein mentioned defendant John V. Lewis was the duly appointed, qualified and acting Collector of Internal Revenue in and for the First California District, Department of Internal Revenue, Treasury [1*] Department, United States of America, that at all such times said defendant John V. Lewis was acting for and on behalf of defendants in the discharge of his said duties as Collector of Internal Revenue.

IV.

That at all times herein mentioned, plaintiff Mount Tivy Winery, Inc., was engaged in the manufacture and production of wines intended for sale or for use in the manufacture or production of any article intended for sale at Fresno, County of Fresno, State of California, located in the First California District, Internal Revenue, United States of America, and in the Southern Division of the United States District for the Northern District of California.

*Page numbering appearing at foot of page of original certified Transcript of Record.

V.

That on January 11, 1934, an Act, known as the "Liquor Taxing Act of 1934" was enacted to raise revenue by taxing certain intoxicating liquors, therein set forth, by the 73rd Congress of the United States of America.

That Section 10 (c) of said Act reads as follows: "Sec. 10 (c). Upon all wines held by the producer thereof upon the day this title takes effect and intended for sale or for use in the manufacture or production of any article intended for sale, there shall be levied, assessed, collected, and paid a floor tax equal to the amount, if any, by which the tax provided for under Section 8 of this title exceeds the tax paid upon the grape brandy or wine spirits used in the fortification of such wine," which Act by its expressed terms, became effective on the day following the enactment of said act, namely January 12, 1934.

VI.

That under the purported authority, and pursuant [2] to the provisions of the said Section 10 (c) of said Liquor Taxing Act of 1934, there was imposed upon and assessed against plaintiff as of January 12, 1934, a tax in the sum of Nineteen Thousand Four Hundred Ninety Six Dollars and thirty two cents (\$19,496.32) upon certain wines allegedly held by plaintiff on January 12, 1934, as the producer thereof; that at all times herein mentioned said wines upon which said tax was imposed upon and assessed against plaintiff except as hereinafter set

forth, were not held by plaintiff as the producer thereof, or at all, and there was no tax due, payable or unpaid to defendants except as hereinafter mentioned, from plaintiff upon said wines under Section 10 (c) of said Act; and, that therefore the assessment of said tax by defendants was and is illegal.

That on February 10, 1934, plaintiff paid to defendants at San Francisco, California, the sum of Two Thousand Dollars (\$2000.00) lawful money of the United States of America on account of said tax so imposed upon and assessed against plaintiff;

That under date of October 31, 1934, defendant John V. Lewis as Collector of Internal Revenue, First California District, Internal Revenue, Treasury Department, United States of America, notified plaintiff in writing to pay the unpaid balance of said tax so assessed and imposed upon plaintiff in the sum of Seventeen Thousand Four Hundred Ninety Six Dollars and thirty two cents (\$17,496.32), together with interest accruing thereon in the sum of One Thousand Five Hundred Fifty Eight Dollars and fifty three cents (\$1,558.53), then totaling the sum of Nineteen Thousand Fifty Four Dollars and eighty five cents (\$19,054.85);

That said written notice and demand for tax notified plaintiff that to avoid further penalty and interest, [3] the said sums must be paid to him as such Collector of Internal Revenue at San Francisco, California, within ten (10) days thereafter; that said defendant in said written notice and de-

mand for tax, demanded further that immediate payment of said sum be made by plaintiff to said defendant as such Collector of Internal Revenue, under the provisions of said Section 10 (c) of the Liquor Taxing Act of 1934, referred to in said notice as Distilled Spirits Floor Tax.

VII.

That, under protest, plaintiff, pursuant to said notice and demand for tax paid to defendant John V. Lewis, as such Collector of Internal Revenue at his office in said First California District, the sum of Nineteen Thousand Fifty Four Dollars and eighty five cents (\$19,054.85) on or about the 10th day of November, 1934, as demanded, aggregating the total sum of Twenty One Thousand Fifty Four Dollars and eighty five cents (\$21,054.85) paid to defendants, representing tax imposed and accrued interest penalties.

That save and except the sum of Five Thousand Six Hundred Thirty Five Dollars and fifty two cents (\$5635.52) no part of the said sum of Twenty One Thousand Fifty Four Dollars and eighty five cents (\$21,054.85) paid to said defendant, was due lawfully to defendants under the provisions of said Liquor Taxing Act of 1934 Sec. 10 (c) thereof, and that the said sum of Fifteen Thousand Dollars Four Hundred and Nineteen Dollars and thirty three cents (\$15,419.33) was erroneously paid by plaintiff to defendants and was unlawfully collected by defendants from plaintiff thereunder.

VIII.

That, within three years after filing a return with defendants, and within two years from the time of [4] payment by plaintiff to defendants of the said sum of Fifteen Thousand Four Hundred Nineteen Dollars and thirty three cents (\$15,419.33) as aforesaid, a claim for refund was thereafter duly and regularly presented by, for, and on behalf of plaintiff to defendants, in the manner, and as provided by law, and the rules and regulations of the Treasury Department, Department of Internal Revenue of defendant, United States of America.

That plaintiff is informed and believes, and upon the ground of such information and belief alleges: that within two years last past said claim for refund of said taxes and penalties so erroneously paid by plaintiff as aforesaid, to, and illegally collected by defendants, was disallowed and rejected by defendants; and, that within two years last past defendants notified plaintiff by registered mail of the disallowance and rejection of said claim for refund of said taxes and penalties.

IX.

That plaintiff is informed and believes and upon the ground of such information and belief alleges that defendant John V. Lewis resigned as Collector of Internal Revenue, First California District, Internal Revenue, Treasury Department, United States of America, since the rejection of the claim

for refund of taxes and penalties erroneously paid by plaintiff and unlawfully collected by defendants, hereinabove set forth, and, that said defendant, John V. Lewis is no longer engaged or employed by defendant United States of America as such Collector of Internal Revenue, First California, Internal Revenue, Treasury Department, United States of America.

Wherefore, plaintiff prays etc.

And for a second, separate and distinct cause of [5] action against defendants, plaintiff alleges:

I.

Plaintiff repleads Paragraphs I, II, III, IV, V, VI, VIII, and IX of plaintiff's first cause of action, in each and every particular as if said paragraphs were set forth and repeated herein in full, in this, plaintiff's second cause of action against defendants.

II.

That, under protest, plaintiff, pursuant to said notice and demand for tax, paid to defendant John V. Lewis as Collector of Internal Revenue at his office in the First California District the sum of Fifteen Thousand Four Hundred and Nineteen Dollars and Thirty Three Cents (\$15,419.33) as demanded on or about the 10th day of November, 1934.

III.

That at all times herein mentioned section 10(c) of the Liquor Taxing Act of 1934, and the tax

therein provided, was and is, in, and a, violation of Article I, Section 2, Clause 3, and Article I, Section 9, Clause 4 of the Constitution of the United States of America, and was and is unconstitutional, in:

1—that said Section provides for the levy assessment and collection of a direct tax, “Upon all wines held by a producer * * * *” based upon ownership rather than an excise tax upon the manufacture, use or sale of such wines; and

2—that said tax, therein imposed, was not apportioned among the several states, in proportion to the Census or Enumeration as provided, permitted and required under the aforementioned provisions of Article I of the Constitution of the United States of America. [6]

IV.

That no part of the said sum of Fifteen Thousand Four Hundred and Nineteen Dollars and Thirty Three Cents (\$15,419.33) paid to defendants was due lawfully under the provisions of the Liquor Taxing Act of 1934, Section 10(c) thereof, and the levy, assessment and collection of said sum from plaintiff by defendants was and is a violation of the aforementioned provisions of Article I, of the Constitution of the United States of America, and was and is illegal and unconstitutional.

Wherefore, plaintiff demands judgment against defendants, and each of them, as follows:

1. adjudging that the said sum of Fifteen Thousand Four Hundred and Nineteen Dollars and Thirty Three Cents (\$15,419.33) was erroneously paid by plaintiff and illegally collected by defendants under the purported authority allegedly conferred upon defendants pursuant to and under the provisions of Section 10(c) of the Liquor Taxing Act of 1934, and under the provisions of the Constitution of the United States of America; and
2. Requiring defendants, and each of them, to repay forthwith the said sum of Fifteen Thousand Four Hundred and Nineteen Dollars and Thirty Three Cents (\$15,419.33) erroneously paid by plaintiff and illegally collected by defendants under the provisions of Section 10(c) of the Liquor Taxing Act of 1934 and in violation of the provisions of the Constitution of the United States of America, together with interest thereon, as provided by law, at the rate of six (6) per cent per annum, from the 10th day of November, 1934, until paid in full; and
3. for such other and further relief as to this Court may seem meet and equitable.

ROBERT H. FOUKE,
Attorney for Plaintiff.

[Endorsed]: Filed July 28, 1938. [7]

[Title of District Court and Cause.]

**ANSWER OF DEFENDANT JOHN V. LEWIS
TO COMPLAINT**

**ANSWER TO FIRST CAUSE OF ACTION
AGAINST SAID DEFENDANT**

Defendant admits the allegations contained in paragraphs II and V and the allegation that said defendant John V. Lewis is no longer engaged or employed by the United States of America as Collector of Internal Revenue, First California District, Internal Revenue, Treasury Department, United States of America, in paragraph IX of the first cause of action of the Complaint, and denies each and every other allegation contained in the first cause of action of the Complaint. [8]

**ANSWER TO SECOND CAUSE OF ACTION
AGAINST SAID DEFENDANT**

First Defense

The second cause of action of said Complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant admits the allegations contained in paragraphs II and V and the allegation that said defendant John V. Lewis is no longer engaged or employed by the United States of America as Collector of Internal Revenue, First California District, Internal Revenue, Treasury Department, United States of America, in paragraph IX of the

first cause of action of the Complaint incorporated by reference in the second cause of action of the Complaint; and denies each and every other allegation contained in the second cause of action of the Complaint.

Wherefore the defendant prays:

1. That the plaintiff take nothing by reason of its action;
2. That the defendant be dismissed with his costs of suit incurred herein;
3. For such other and further relief as to this Court may seem just and equitable in the premises.

Dated: May 1, 1939.

FRANK J. HENNESSY,

United States Attorney for
the Northern District of
California, Attorney for the
Defendant John V. Lewis.

Receipt of Service.

[Endorsed]: Filed May 1, 1939. [9]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT UNITED STATES
OF AMERICA TO COMPLAINT

ANSWER TO FIRST CAUSE OF ACTION
AGAINST SAID DEFENDANT

Defendant admits the allegations contained in paragraphs II and V and the allegation that said

defendant John V. Lewis is no longer engaged or employed by the United States of America as Collector of Internal Revenue, First California District, Internal Revenue, Treasury Department, United States of America, in paragraph IX of the first cause of action of the Complaint, and denies each and every other allegation contained in the first cause of action of the Complaint. [10]

ANSWER TO SECOND CAUSE OF ACTION AGAINST SAID DEFENDANT

First Defense

The second cause of action of said Complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant admits the allegations contained in paragraphs II and V and the allegation that said defendant John V. Lewis is no longer engaged or employed by the United States of America as Collector of Internal Revenue, First California District, Internal Revenue, Treasury Department, United States of America, in paragraph IX of the first cause of action of the Complaint incorporated by reference in the second cause of action of the Complaint; and denies each and every other allegation contained in the second cause of action of the Complaint.

Wherefore the defendant prays:

1. That the plaintiff take nothing by reason of its action;

2. That the defendant be dismissed with its costs of suit incurred herein;
3. For such other and further relief as to this Court may see just and equitable in the premises.

Dated: May 1, 1939.

FRANK J. HENNESSY,

United States Attorney for
Northern District of California,
Attorney for the
Defendant United States
of America.

Receipt of Service.

[Endorsed]: Filed May 1, 1939. [11]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between Mount Tivy Winery, Inc., the plaintiff, and John V. Lewis and the United States of America, two of the defendants named above, that the recital of facts hereinafter contained may be deemed true for all purposes in connection with the above entitled cause, as follows:

I.

That plaintiff, the Mount Tivy Winery, Inc., was [12] at all times mentioned in the complaint and herein, and now is a corporation duly organized and existing under and by virtue of the laws of the

State of California; and at all times mentioned herein plaintiff had its principal place of business at 600 Rowell Building, located in the City of Fresno, County of Fresno, State of California, and its principal place of business is now located at LacJac, County of Fresno, State of California, in the Northern Division of the Southern District of California, with mailing address as P. O. Box 1288, Fresno County, California.

II.

That plaintiff, the Mount Tivy Winery, Inc., was at all times mentioned in the complaint and herein, engaged in the manufacture, production and sale of wines intended for sale or for use in the manufacture or production of articles intended for sale at Bonded Winery No. 3620 located at LacJac, about 2.3 miles east of Parlier Post Office, Fresno County, State of California, within the First California District, Internal Revenue, United States of America and in the Northern Division of the Southern District of California.

III.

That on July 5, 1933, the defendant John V. Lewis was duly appointed and qualified as the Collector of Internal Revenue in and for the First California District, Department of Internal Revenue, Treasury Department, United States of America, and thereafter, at all times mentioned in the complaint and herein, was the duly appointed,

qualified and acting Collector of Internal Revenue, Treasury Department, United States of America, and acted and continued to act as such until March 7, 1938, when he resigned. [13]

IV.

That the Fidelity Warehouse Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of California, and at all times mentioned in the complaint and herein, owned and operated a public warehouse business known as Public Bonded Storeroom No. 3728, in the warehouse located at LacJac contiguous with and adjoining the Bonded Winery No. 3620 owned and operated by plaintiff, Mount Tivy Winery, Inc., under the authority of and pursuant to the laws of the State of California and Treasury Decision No. 19 and General Circular No. 141, approved September 16, 1933, attached hereto as Exhibit "A".

That the Fidelity Warehouse Corporation made application upon the form attached hereto, entitled Exhibit "B", to the Supervisor of Permits, Bureau of Industrial Alcohol, under the laws and regulations governing the establishment of bonded wineries and storerooms, for a permit to establish Public Bonded Storeroom No. 3728, and upon the issuance thereof to it, a copy of which is attached hereto as "Exhibit "C", qualified and gave blanket bonds, in the forms attached, in the maximum sum of \$100,000.00 on Form 1530A, entitled Exhibit

"D", and on Form 699A, entitled Exhibit "E", to the defendant United States of America; That in addition to this, said Fidelity Warehouse Corporation was obliged to and did render monthly reports to the Supervisor of Permits on Form 702, attached hereto, entitled "Exhibit "F", accounting for all wines received, stored and removed from the bonded storeroom premises. [14]

V.

That on November 13, 1933 a Field Warehouse Storage Agreement was executed in writing by and between plaintiff and the Fidelity Warehouse Corporation which provided, among other things, that the Fidelity Warehouse Corporation should furnish plaintiff all field warehouse services necessary to plaintiff's business and that plaintiff should employ the Fidelity Warehouse Corporation for all field warehouse services required by plaintiff and, further, that plaintiff would furnish warehouse premises sufficient in number and capacity to provide adequate storage space for all wine to be warehoused, so located and constructed as to adequately secure the safety of the wine, and to lease to the Fidelity Warehouse Corporation all premises owned or controlled by plaintiff in which field warehousing was to be conducted. A copy of this Field Warehouse Storage Agreement is attached hereto as Exhibit "G".

That under said Agreement the Fidelity Warehouse Corporation agreed, among other things, for

the consideration therein expressed and subject to the terms and conditions therein contained: (1) to maintain a public warehouse in and upon the premises leased by plaintiff to said corporation; (2) to furnish to plaintiff all Field Warehouse services necessary to plaintiff's business; (3) to place its bonded agent and/or bonded watchman in charge of said warehouses(s) and leased premises; and (4) to issue Field Warehouse Receipts upon the merchandise or property which plaintiff may store therein or thereon; provided, however: (a) that the Fidelity Warehouse Corporation shall be free from all liabilities for taxes, assessments, charges or penalties levied, assessed or imposed by federal, state, county or municipal government, or by any other quasi-public or governmental [15] agency upon or in respect of the wines warehoused under the terms of the said agreement; (b) that plaintiff agreed to render all reports required of plaintiff or said corporation, or either of them, in respect to the commodities warehoused, by any and all governmental agencies; and (c) that at the option of said Fidelity Warehouse Corporation, it could pay all taxes, assessments, charges or penalties, service, blend, fortify, rack, handle and care for the warehoused wine, and render all reports, at the expense of plaintiff, in the event plaintiff failed to do so as agreed in said agreement.

VI.

That on November 13, 1933 plaintiff, pursuant to the provisions of the Field Warehouse Storage

Agreement and as authorized by Treasury Decision No. 19, approved September 16, 1933, executed in writing a field warehouse lease which leased to the Fidelity Warehouse Corporation a portion of a building, and all containers therein, for use as a warehouse. The building so leased was adjacent to the same premises as plaintiff's Bonded Winery No. 3620, bore the same post office box number and was contiguous with and adjoining the structures of plaintiff's Bonded Winery No. 3620. This portion of a building was registered as Public Bonded Storeroom No. 3728. A copy of the Field Warehouse Lease is attached hereto as Exhibit "H".

That at all times mentioned in the complaint and herein, said leased premises were in the lawful possession and under the control of the Fidelity Warehouse Corporation under and subject to the terms and conditions of said lease.

That Exhibits "G" and "H" were executed prior to the passage of Section 10 (c) of the Liquor Taxing Act of 1934, and that at the time of the execution of said agreements [16] the parties thereto did not know that Section 10 (c) of the Liquor Taxing Act of 1934 was contemplated or would be enacted into law; and that neither before nor at the time of the execution of said agreements, did either or both of the parties thereto, negotiate, contemplate or execute said agreements in order to avoid or evade the provisions of Section 10 (c) of the Liquor Taxing Act of 1934.

VII.

That during the months of November and December, 1933, and before January 12, 1934, plaintiff removed 484,000 gallons of fortified wine from its Bonded Winery No. 3620 and stored it in Public Bonded Storeroom No. 3728 and, in writing, requested the Fidelity Warehouse Corporation to issue four (4) original Wine Warehouse Receipts, negotiable in form, for 484,000 gallons of wine, to the Bank of America National Trust and Savings Association, Fresno Branch, or order, (herein referred to as Bank) as follows: one for 211,000 gallons dated November 29, 1933, numbered 01304 (copy attached hereto as Exhibit "I"); the second for 123,000 gallons dated December 4, 1933, numbered 01307 (copy attached hereto as Exhibit "J"); the third for 119,000 gallons dated December 22, 1933, numbered 01312 (copy attached hereto as Exhibit "K"); and the fourth for 31,000 gallons dated January 6, 1934, numbered 01316 (copy attached hereto as Exhibit "L"); which receipts were issued and executed in the name of and were delivered at the request of plaintiff on said dates in accordance with said request to said Bank by the Fidelity Warehouse Corporation in accordance with and pursuant to the authority contained in its Articles of Incorporation and By-laws and the laws of the State of California.

That thereafter and prior to January 12, 1934, [17] several promissory notes in the form of Exhibit "M", attached hereto and made a part hereof,

were prepared by the Bank and were executed by plaintiff at the request and to the order of the Bank, and plaintiff on December 22, 1933, entered into a collateral agreement with the Bank, a copy of which said agreement is attached hereto as Exhibit "M1".

That at all times prior to the sale or disposition thereof and the wine covered thereby, said warehouse receipts were in the name and in the possession and under the control of the Bank of America National Trust and Savings Association, as herein set forth.

VIII.

That the 484,000 gallons of wine so removed and stored was the first wine removed to and stored in Public Bonded Storeroom No. 3728 and remained the only wine so removed and stored by plaintiff or anyone else up to and including January 12, 1934.

IX.

That all wine delivered to the Fidelity Warehouse Corporation by plaintiff covered by said warehouse receipts, negotiable in form, was released subsequently thereunder by said Bank by the execution and delivery to the Fidelity Warehouse Corporation by said Bank of an "Order for Warehouse Release" upon the form attached hereto as Exhibit "N".

X.

That prior to the Liquor Taxing Act of 1934 sec-

tion 612 of the Revenue Act of 1918, as amended, read as follows:

“Sec. 612. (Revenue Act of 1918). That under such regulations and official supervision and upon the giving of such notices, entries, bonds, and other security the Commissioner, with the approval of the Secretary, may prescribe, any producer of wines defined under the [18] provisions of this title, may withdraw from any fruit distillery or special bonded warehouse grape brandy, or wine spirits, for the fortification of such wines on the premises where actually made; Provided, That there shall be levied and assessed against the producer of such wines a tax (in lieu of the internal-revenue tax now imposed thereon by law) of 10 cents per proof gallon of grape brandy or wine spirits whenever withdrawn and hereafter so used by him in the fortification of such wines during the preceding month, which assessment shall be paid by him within ten months from the date of notice thereof; Provided further, That nothing contained in this section shall be construed as exempting any wines, cordials, liqueurs, or similar compounds from the payment of any tax provided for in this title.”

That on January 11, 1934, the 73d Congress of the United States of America enacted an act known as the “Liquor Taxing Act of 1934” to raise revenue by taxing certain intoxicating liquors, and for the other purposes therein set forth.

That Section 8 of Title I of said Act reads as follows:

“Sec. 8. Section 612 of the Revenue Act of 1918, as amended (relating to the tax on grape brandy and wine spirits withdrawn and used in the fortification of wines) (U.S.C., Sup. VI, title 26, sec. 1301), is amended by striking out ‘10 cents per proof gallon’ and inserting in lieu thereof ‘20 cents per proof gallon’.”

That Section 10 (c) of Title I of said Act reads as follows:

“Sec. 10 (c). Upon all wines held by the producer thereof upon the day this title takes effect and intended for sale or for use in the manufacture or production of any article intended for sale, there shall be levied, assessed, collected, and paid a floor tax equal to the amount, if any, by which the tax provided for under section 8 of this title exceeds the tax paid upon the grape brandy or wine spirits used in the fortification of such wine.”

which Act by its expressed terms became effective on the day following the enactment of said Act, namely, January 12, 1934.

That all taxes therein provided were, by the terms of said Act, due forthwith and were payable 30 days after the effective date of said Act.

XI.

That the 484,000 gallons of fortified wine evidenced by warehouse receipts, stored in said ware-

house on January 12, 1934, [19] had been produced by plaintiff at its Bonded Winery No. 3620 prior to January 11, 1934 and contained 147,927.08 proof gallons of brandy previously withdrawn from a distillery and previously used in the fortification of wine produced by plaintiff; That prior to January 11, 1934 and at the time of the withdrawal and use of said brandy in fortifying said wine, there had been assessed against plaintiff a tax at the rate of 10c per proof gallon as required by the Internal Revenue Law of 1918, as amended; upon which wine there was due from plaintiff an additional tax under the provisions of Section 10 (c) of the Liquor Taxing Act of 1934 (at the rate of 10c per proof gallon of brandy used in fortification) in the sum of \$14,792.71 upon 147,927.08 proof gallons of brandy, provided said wine was then "held" by plaintiff as the producer thereof and said Act was valid in connection therewith.

XII.

That on January 2, 1934 plaintiff had in its Bonded Winery No. 3620, 220,297.34 gallons of fortified wine. This wine had been produced by plaintiff in its winery and contained 61,863.88 proof gallons of brandy previously withdrawn from a distillery for the fortification of wine previously produced by plaintiff and upon which brandy plaintiff had been assessed a tax at the rate of 10c per proof gallon as required by the Internal Revenue Law of 1918, as amended, and upon which wine

there was due from plaintiff a tax under the provisions of Section 10(c) of the Liquor Taxing Act of 1934 (at the rate of 10c per proof gallon of brandy used in fortification) in the sum of \$6,186.39, provided said wine was then "held" by plaintiff as the producer thereof and said Act was valid in connection therewith; That no claim for abatement or refund was made for said latter sum, consequently plaintiff is not entitled to recover the same in this action.

XIII.

That the said 484,000 gallons of fortified wine were de- [20] livered to the warehouse company for storage in Public Bonded Storeroom No. 3728 by plaintiff prior to January 11, 1934 and were intended for sale and were sold, as herein set forth; That the Bank, from time to time, extended unsecured bank credits to plaintiff; That, as the wine was produced and delivered by plaintiff to the Warehouse Company, warehouse receipts, negotiable in form, covering such wine were issued in the name, and to the order of, and were delivered to and received by the Bank; That, as hereinbefore set forth, plaintiff executed promissory notes payable to the Bank on the form attached hereto as Exhibit "M", and made the collateral agreement attached hereto as Exhibit "M¹"; That the Bank extended bank credits to plaintiff prior to the actual issuance of said warehouse receipts to the Bank, or its order; That thereafter plaintiff secured a prospective purchaser for the wine and notified the

Bank of the proposed terms of sale; That in the event the purchaser and the terms of sale were satisfactory to the Bank the sale was consummated with the approval of the Bank upon a cash or credit basis; That, as part of the same general sale transaction, the Bank executed and delivered to the Fidelity Warehouse Corporation an "Order for Warehouse Release" in the form of Exhibit "N" attached, covering the wine sold to the purchaser and either delivered the said warehouse receipts to said warehouse company for cancellation, or for the endorsement thereon of the amount of the wine sold or for the issuance of a new warehouse receipt, negotiable in form, in the name and to the order of the Bank, for the remaining unsold quantity of wine covered by said warehouse receipt, and re-delivery to the Bank of the cancelled, endorsed or new receipt, or delivered both said order and warehouse receipt to the purchaser or the [21] warehouse company subject to the purchaser's further order or endorsement.

That subject to the order of the purchaser, wine sold was thereafter prepared for shipment to the purchaser, or order, on the warehouse promises by the plaintiff and an entry made on Form 702, a report filed monthly with defendant, indicating the release of such wine to plaintiff; and that such wine was received by plaintiff for the purposes mentioned for the account of the purchaser and subject to the order of the purchaser.

XIV.

That, except as herein set forth, the Bank never negotiated said warehouse receipts.

That at all times herein mentioned all of said wine, except as otherwise specified, was in the physical possession and under the physical control of the Fidelity Warehouse Corporation and was held by it as a Bonded Warehouseman in its public Bonded Storeroom No. 3728 under the laws of the State of California, the United States of America, and the rules and regulations of the Treasury Department, including T. D. #19 supra, and the agreements between it and plaintiff, plaintiff and the Bank and it and the Bank.

That in the regular course of business, and in accordance with the agreement executed by plaintiff with the Fidelity Warehouse Corporation, plaintiff, from time to time, manufactured and delivered to the Fidelity Warehouse Corporation the wine herein referred to, at the premises leased to the Fidelity Warehouse Corporation by plaintiff; That all wine so delivered to the Fidelity Warehouse Corporation was placed in storage tanks located in and upon the leased premises; That signs were placed over and outside the entrances and inside the leased premises to the effect [22] that said leased premises was the registered Public Bonded Storeroom No. 3728 of the Fidelity Warehouse Corporation; That upon receipt of the wine from plaintiff, said Warehouse Company caused to be placed upon the tanks in which the wine was stored, stock cards showing that

the wine was warehoused to said Bank, the description of the wine, the date of warehousing, the negotiable warehouse receipt number issued against the wine, and the quantity and quality of the wine therein stored; That locks were placed upon all entrances to the leased premises by the Fidelity Warehouse Corporation and the key to each of said locks was in the possession and was retained by the agent of the Fidelity Warehouse Corporation in charge of the leased premises; That at all times herein mentioned the Fidelity Warehouse Corporation caused to be employed its bonded agent to whom detailed printed instructions were given as to his duties; That the salary of said bonded agent was paid by the Fidelity Warehouse Corporation; That plaintiff was not permitted access to the leased premises except through the bonded agent of the Fidelity Warehouse Corporation in accordance with the terms of said written agreement herein referred to, and then only under the observation and supervision of the bonded agent of the Fidelity Warehouse Corporation; That the warehouse was opened and closed by the bonded agent who kept it locked at all times that he was not personally there, and said bonded agent received and delivered all merchandise at the leased premises.

That in accordance with the provisions of paragraph nine of the Field Warehouse Storage Agreement, "Exhibit "G", and in accordance with an understanding between the plaintiff and the Fidelity Warehouse Corporation pursuant thereto, the plain-

tiff was, from time to time, permitted to have access to [23] the said bonded storeroom for the purpose of servicing and caring for said wine during the period said wine was stored in said bonded storeroom.

XV.

That the Bank did not pay personal property taxes or any taxes imposed by the Liquor Taxing Act of 1934 upon the wine covered by the warehouse receipts; That all taxes thereon were paid by plaintiff in accordance with and pursuant to the provisions of the agreement attached hereto entitled Exhibit "G" executed by and between plaintiff and Fidelity Warehouse Corporation.

XVI.

That on January 11, 1934 the Commissioner of Internal Revenue instructed the defendant John V. Lewis with relation to the collection of the tax imposed by Section 10 (c) as set out in A & C, mimeograph Coll. No. 4132 dated January 11, 1934, attached hereto as Exhibit "O"; That in accordance therewith and pursuant thereto said defendant John V. Lewis, for and on behalf of defendant United States of America, caused to be delivered to Plaintiff a mimeographed circular dated January 15, 1934 entitled "Floor Tax on Distilled Spirits, Wines, Cordials, etc.", a copy of which is attached hereto as Exhibit "P".

XVII.

That pursuant thereto, and in the belief that a tax was due defendants, on February 6, 1934 plain-

tiff, pursuant to such belief and the further belief that it was legally required, returned to defendant John V. Lewis an Inventory and Return on Form 756, a form prepared and supplied by defendant to plaintiff, a copy of which is attached hereto as Exhibit "Q" showing 659,106.97 gallons of wine containing 194,963.16 proof gallons of brandy on hand, upon which a tax was believed [24] to be due of \$19,496.32.

XVIII.

That on February 10, 1934, said plaintiff paid to defendant John V. Lewis as such Collector of Internal Revenue at his office in San Francisco, California, the sum of \$2000.00.

That on February 17, 1934 plaintiff addressed a letter to the defendant John V. Lewis, Collector of Internal Revenue, San Francisco, California, in which it is stated that the \$2000.00 cash paid to said Collector of Internal Revenue "represents a tax liability on brandy in fortified wines in the hands of the producer, Mount Tivy Winery, Inc." and that "the remaining balance of \$17,496.32 represents tax on brandy in fortified wines held by the Fidelity Warehouse Company, who held full possession and control of said wine and brandy as bailee or warehouseman for the Bank of America." In said letter, plaintiff "protests the payment of any tax assessed or levied against said wine or brandy held by the Fidelity Warehouse Corporation"....."based on the fact that said wines and brandy"....."were not

held by the producer on the date the Internal Liquor Taxing Act of 1934 became effective." (Copy of letter attached as Exhibit "R".

XIX.

That in February 1934 the defendant John V. Lewis prepared and forwarded to the Commissioner of Internal Revenue, Washington, D. C., an assessment list showing a tax due under the provisions of Section 10(c) of the Liquor Taxing Act of 1934 from plaintiff in the amount of \$19,496.32, the amount returned by plaintiff on its Inventory and Return Form No. 756 on February 6, 1934, which sum was assessed by the Commissioner of Internal Revenue on April 11, 1934. The assessment list also showed the payment of \$2000.00 and the [25] balance due as \$17,496.32.

XX.

That on May 14, 1934 plaintiff filed claim in abatement of \$14,160.99 of the tax assessed against plaintiff. (Copy of claim attached as Exhibit "S".)

XXI.

That on August 10, 1934 plaintiff filed claim in abatement of \$3,335.33 of the taxes reported as due by plaintiff on February 10, 1934, a copy of which claim is attached as Exhibit "T". Of the original sum reported as due by plaintiff on February 10, 1934, plaintiff had thus paid the sum of \$2000.00 and claimed abatement of the balance of \$17,496.32.

XXII.

That on October 18, 1934 the Commissioner of Internal Revenue rejected plaintiff's claim in abatement of \$14,160.99 of the taxes by letter dated October 18, 1934.

XXIII.

That on October 24, 1934 the Commissioner of Internal Revenue rejected plaintiff's claim in abatement of \$3,335.33 of the taxes by letter dated October 24, 1934.

XXIV.

That under date of October 31, 1934 defendant John V. Lewis as Collector of Internal Revenue, First California District, Internal Revenue, Treasury Department, United States of America, notified plaintiff in writing to pay said tax in the sum of Seventeen Thousand Four Hundred Ninety-Six Dollars and thirty-two cents (\$17,496.32), the unpaid balance so assessed and imposed upon plaintiff, together with interest accruing thereon in the sum of One Thousand Five Hundred Fifty-eight Dollars and fifty-three cents (\$1,558.53), totaling the sum of Nineteen Thousand Fifty-four Dollars and [26] eighty-five cents (\$19,054.85), and that to avoid further penalty and interest, the sum of Nineteen Thousand Fifty-four Dollars and eighty-five cents (\$19,054.85) must be paid to him as such Collector of Internal Revenue at San Francisco, California, within ten (10) days thereafter; That said defendant in said written notice and demand for tax, de-

manded further that immediate payment of said sum be made by plaintiff to said defendant as such Collector of Internal Revenue, under the provisions of said Section 10 (c) of the Liquor Taxing Act of 1934, referred to in said notice as Distilled Spirits Floor Tax.

XXV.

That, under protest, plaintiff, on November 10, 1934, pursuant to said notice and demand for tax, paid to Defendant John V. Lewis, as such Collector of Internal Revenue at his office in said First California District the sum of \$17,496.32, the unpaid balance of the assessed tax, and the sum of \$1,558.53, accrued interest on said unpaid balance of said tax, a total of \$19,054.85. This amount, together with \$2000.00 paid to defendant on February 10, 1934, makes a grand total of \$21,054.85, as evidenced by Collector's stamp on Form 1 and Form 17, Notice and Demand for Tax, attached hereto as Exhibits "U" and "V".

XXVI.

That on August 28, 1935 plaintiff filed with the defendant John V. Lewis a claim for the refund of \$15,419.33.

XXVII.

That on July 29, 1936 the Commissioner of Internal Revenue rejected plaintiff's claim for refund, and on that date sent plaintiff a notice of the disallowance of the claim by registered mail. [27]

XXIX.

Each party hereby reserves the right to object to a consideration of any statement of fact contained in this Stipulation upon the ground that the same is incompetent, irrelevant or immaterial.

Any facts not covered by this Stipulation but which can be ascertained from the pleading, may be given consideration if relevant and not inconsistent with the stipulated facts.

Dated: This 30th day of April, 1941.

FRANK J. HENNESSY,

Per W. F. M.,

Attorney for defendants John
V. Lewis and the United
States of America.

ROBERT H. FOUBE,

Attorney for the plaintiff,
Mount Tivy Winery, Inc.

[Endorsed]: Filed Apr. 30, 1941. [28]

LIST OF EXHIBITS

Mount Tivy Winery, Inc.

Exhibit No.

- “A” Treasury Decision No. 19—Gen'l. Circular No. 141
- “B” Application for Permit Form 1404
- “C” Permit to operate—Form 1405
- “D” Blanket Bond—Form 1530A
- “E” Blanket Bond—Form 699A

- “F” Monthly Report—Form 702
- “G” Field Warehouse Storage Agreement
- “H” Field Warehouse Lease
- “I” Warehouse Receipt No. 01304
- “J” Warehouse Receipt No. 01307
- “K” Warehouse Receipt No. 01312
- “L” Warehouse Receipt No. 01316
- “M” Promissory Note
- “M-1” Collateral Agreement
- “N” Order for Warehouse Release
- “O” A & C Mimeo Coll. No. 4132
- “P” Mimeo Letter “Floor Tax on Distilled Spirits, Wines, Etc.
- “Q” Inventory & Return—Form 756
- “R” Letter of Protest
- “S” Claim in Abatement
- “T” Claim in Abatement
- “U” Receipt for payment of Taxes—Form 1
- “V” Notice and Demand for Tax—Form 17.

[29]

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION
OF FACTS

It Is Hereby Stipulated by and between Mount Tivy Winery, Inc., the plaintiff, and John V. Lewis and the United States of America, two of the defendants above named, that the recital of facts hereinafter contained supplements the Stipulation

of Facts previously filed herein and may be deemed true for all purposes in connection with the above [30] entitled cause.

On February 28, 1939 plaintiff forwarded to the Honorable Frank Murphy, Attorney General of the United States, a copy of the Complaint and Summons in the above entitled action, which was received by the Attorney General of March 6, 1939.

Dated: This 30th day of October, 1941.

FRANK J. HENNESSY

Attorney for defendants John V.
Lewis and the United States of
America.

ROBERT H. FOUKE

Attorney for the plaintiff, Mount
Tivy Winery, Inc.

[Endorsed]: Filed Nov. 1, 1941. [31]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

Ordered:

That plaintiff take nothing by its action and that defendants be dismissed with costs.

Counsel for defendants may prepare and submit findings of fact, conclusions of law, and judgment in accordance with opinion filed this day.

Dated: January 10, 1942.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Jan. 10, 1942. [32]

[Title of District Court and Cause.]

OPINION

St. Sure, District Judge:

Plaintiff sues to recover \$15,419.33, with interest, claimed to have been illegally imposed and collected by defendants under the "Liquor Taxing Act of 1934." [33]

The complaint contains two counts. The first states a claim for recovery, if justified by the law and the evidence. The second adopts the allegations of the first, by reference, and adds that section 10(C)¹ of the Liquor Taxing Act of 1934, under the provisions of which the taxes were assessed and collected, violates Article I, section 2, clause 3, and Article I, section 9, clause 4 of the Constitution of the United States of America.

The case was submitted upon a stipulation of facts and briefs of respective parties. There are six other cases in which the stipulated facts are similar, and all seven cases were consolidated for trial. The decision in the instant case is determinative of all. The plaintiffs in the other cases, and the amounts

1. "Upon all wines held by the producer thereof upon January 12, 1934, and intended for sale or for use in the manufacture or production of any article intended for sale, there shall be levied, assessed, collected and paid a floor tax equal to the amount, if any, by which the tax provided for under section 443 of this title exceeds the tax paid upon the grape brandy or wine spirits used in the fortification of such wine." 26 USCA § 451b, 1934 Cumulative Annual Pocket Part.

each seeks to recover, with interest, are as follows:

California Wineries and Distilleries, Inc., a California corporation, No. 20464-R, \$13,-449.80;

Fresno Winery Inc., a California corporation formerly known as Elsinore Winery, Inc., a corporation, and Lucerne Winery, Inc., a corporation, No. 20465-L, \$6,602.52;

Santa Lucia Wineries, Inc., a California corporation, No. 20466-R, \$13,918.00;

Charles Dubbs and Samuel Caplan, copartners doing business under the firm name and style of Alta Winery, No. 20467-S, \$7,430.57;

California Growers Wineries, a California corporation, No. 20474-W, \$29,923.55;

St. George Winery, a California corporation, No. 21113-L, \$10,577.23.

The defendants are identical in all of the cases.

[34]

Defendants question the jurisdiction of the court as to the suit against United States. There is some discussion in the briefs as to whether the court takes jurisdiction under 28 USCA §41, subd. (20)² (which

2. "The district courts shall have original jurisdiction as follows: * * * (20) * * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected, without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the Internal-

is part of the Tucker Act), or sub. (5).³ It is obvious that the 1921 amendment to subd. (20) extended the jurisdiction of the District Court so as to embrace suits against United States where the claim exceeds \$10,000, if the Collector of Internal Revenue by whom the tax was collected is no longer in office when suit is filed. As that is true in this case, the court takes jurisdiction of the United States, if at all, under subd. (20).

The procedure for suits against the United States under 28 USCA § 41(20) is regulated by §§5 and 6 of the Tucker Act, 28 USCA §§762, 763. Title 28 USCA §763 provides that "plaintiff shall cause a copy of his petition * * * to be served upon the" United States District Attorney "in the District wherein suit is brought, and shall mail a copy [35] of the same, by registered letter, to the Attorney General * * *, and shall file with the Clerk of the court an affidavit of such service. This procedure must be complied with strictly. Reid Wrecking Co. v. United States, D. C. 202 F. 314, and all its re-

Revenue laws even if the claim exceeds \$10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

3. "Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals."

quirements must be met before the commencement of the action can be effected.” Bachman, Emmerich & Co. v. U. S. 21 F. Supp. 682, 684; see also Reid v. United States, 211 U. S. 529, 538; Munro v. United States, 303 U. S. 36, 40. The requirements for service are jurisdictional.

Here service was made upon the United States Attorney of this District on January 30, 1939. A stipulation filed herein on November 1, 1941 (more than five months after trial) states that the Attorney General was served on February 28, 1939. As the claim which was the basis of this action was rejected on July 29, 1936, both services were made after the expiration of the two-year limitation allowed by 26 USCA §3772(a)(2).⁴

Although this suit was filed on July 28, 1938, (the last day on which it could have been filed under the two-year limitation), plaintiff argues that service as prescribed by 28 USCA s763 is merely procedural and not substantive, and therefore, since the adoption of the Federal Rules of Civil Procedure, effective September 16, 1938, [36] such service is not necessary to commence an action

4. “No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.”

against the United States, citing Rule 3,⁵ Rule 4(d)(4),⁶ and *United States v. American Surety*, 25 F. Supp. 700, 702. On the question of whether the new Rules apply to the Tucker Act, a careful examination of the law on this subject⁷ shows that

5. "A civil action is commenced by filing a complaint with the court."

6. " * * * Service shall be made as follows: * * * (4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency."

7. U. S. v. American Surety, 25 F. Supp. 700, 702; *Sherwood v. U. S.* 112 F. (2d) 587, 590, reversed, *U. S. v. Sherwood*, 312 U. S. 584; *Boerner v. U. S.*, 26 F. Supp. 769. See also *Gallagher v. Carroll*, 27 F. Supp. 568; *Schram v. Koppin*, 35 F. Supp. 313, *Schram v. Costello*, 36 F. Supp. 525; *Schram v. Cudnau*, D. C. E. D. Mich., decided December 26, 1940; *Hackner v. Guaranty Trust Co. of N. Y.*, 117 F. (2d) 95; Federal Rules Service with Vindex, Vol. 4, pp. 882-887; "Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, Cleveland 1938", pp. 183 and 202-203; "Federal Rules of Civil Procedure, Proceedings of Institutes, Washington and New York, 1938, Published by American Bar Association", pp. 34-35; *New Federal Procedure and the Courts*, by Alex Holsoff, 1940, pp. 16-17.

some courts have held that the Rules prevail over the Tucker Act. However, I am of the opinion that as the Tucker Act is a special statute with special procedure outlined by Congress, the new Rules are inapplicable. *Lynn v. United States*, 110 F. (2d) 586; *United States v. Sherwood*, [37] 312 U. S. 584, 586-7. From the discussion of Rules 3 and 4 before the Judiciary Committee of the House of Representatives, 75th Congress, Third Session, Hearings on the Rules of Civil Procedure and H. R. 8892, March 1-4, 1938, Serial 17, pages 73 ff., it appears that the Committee considered a statute of limitations substantive law and intended that the Rules should govern only where there was no Federal or state statute on the subject. A suit against United States, filed under 28 USCA §763, is not "commenced" until the service mentioned is made. As service in this case was made after the expiration of the two-year period allowed by 26 USCA §3772(a)(2), the right of action against United States ceased, and the subsequent adoption of the new Rules did not revive it.

It is true that in *United States v. Sherwood*, *supra*, the Supreme Court approved dismissal for want of jurisdiction where an individual had been joined in the suit against the United States. However, dismissal of the entire action would not be proper here, because this Court has jurisdiction of the Collector of Internal Revenue under 28 USCA §41(5), which requires no special service on the

United States Attorney of this District and on the United States Attorney General.

I therefore conclude that as necessary service to effect commencement of the action as required by 28 USCA §763 was not made within the two-year period specified in 26 USCA §3772(a)(2), this court has no jurisdiction over defendant United States, but has jurisdiction over the Collector under 28 USCA §41(5). [38]

In three of the companion cases mentioned above, namely, No. 20464-R, No. 20474-W, and No. 21113-L, service as required by the Tucker Act (28 USCA §763) was made within the two year period specified in 26 USCA §3773(a)(2), so that in those cases this court would have jurisdiction of the United States as well as of the Collector of Internal Revenue; but in view of my holding against plaintiff in all cases, the point becomes immaterial.

Plaintiff contends that §10(c) of the Liquor Taxing Act of 1934 violates Art. I, Sec. 2, Cl. 3, and Art. I, Sec. 9, Cl. 4 of the United States Constitution, in that it levies a direct tax without proper apportionment. There is no merit in this contention. In *Pennsylvania v. Fix*, 9 F. Supp. 272, 275-276, (affirmed in 79 F. (2d) 520, certiorari denied, 297 U. S. 704), the court held that the tax levied by §10(c) is an excise tax, and as such, constitutional.

In one of its briefs plaintiff attempts to make another constitutional point, stating:

“Imposition of the tax upon merely one part

of a class of persons deprives such persons of the ‘equal protection of the laws’ under the due process clause of the United States Constitution, hence the tax is unconstitutional for this, as well as other reasons noted. Fifth Amendment to the Constitution of the United States, (Article V).”

This loose language, without explanation or authority, is plaintiff’s only reference to the Fifth Amendment. The constitutionality of a statute cannot be raised for the first time in argument. It must be properly pleaded and thereafter adequately argued. *Kewanee Oil & Gas Co. v. Mossamer*, 58 F. (2d) 711, 712; *White Cleaners & Dyers v. Hughes*, 7 F. Supp. 1017, 1023; *Taylor v. Dunbar*, 298 F. [39] 936, 939. A court should proceed with reluctance to set aside legislation as unconstitutional on grounds not properly presented. *McGoldrick v. Compagnie Generale*, 309 U. S. 430, 434. Moreover, “There is strong presumption in favor of the constitutionality and validity of an act of Congress.” *Jacobs v. Peavy-Wilson Lbr. Co.*, 33 F. Supp. 206, 212, and cases cited. The mere fact of enactment of a statute raises a presumption of constitutionality, and the burden of proving otherwise is on the party so asserting. *Kewanee Oil & Gas Co. v. Mossamer*, 58 F. (2d) 711, 712. Plaintiff has failed to sustain that burden. The additional point was probably thrown in, hit or miss, but has no application whatever to the pertinent issue of the levy and collection of an excise tax on liquor, the validity of

which is settled by the decision in *Pennsylvania v. Fox*, supra. For a full discussion of the subject see *Patton v. Brady*, 184 U. S. 608.

Upon the merits, plaintiff contends that it is not liable for the tax because on the effective date of the taxing act, January 12, 1934, the liquor was "held" by the Bank and not by plaintiff.

Plaintiff is a large winery, engaged in the manufacture and production of wines "intended for sale or for use in the manufacture or production of any article intended for sale", as set forth in Section 10(c) hereinabove mentioned. In the latter part of 1933 plaintiff placed the liquor in question in a bonded warehouse, taking four negotiable warehouse receipts, which were delivered to Bank of America under "a collateral pledge agreement," as security for a loan to plaintiff. [40]

"Under the Uniform Warehouse Receipts Act, the warehouseman is ordinarily bound to deliver the goods upon a demand made * * * by a holder of a receipt for the goods * * * if such demand is accompanied with an offer to satisfy the warehouseman's lien, an offer to surrender the receipts if negotiable and a willingness to sign an acknowledgment of delivery." 25 Cal. Jur. p. 955, Section 12; Uniform Warehouse Receipts Act, Section 8. Here the Bank, the holder of the receipt, could not properly demand plaintiff's wine from the warehouseman except under certain conditions set forth in the "collateral pledge agreement" between plaintiff and the Bank. As these conditions never matured,

the Bank never acquired the right to negotiate the receipts. The "collateral pledge agreement" refers to the Bank as "pledgee or trustee", and provides that in case of sale the surplus was to be "subject to the order of" plaintiff.

The warehouse receipt is only *prima facie* evidence of ownership. Akron Cereal Co. v. First National Bank, 3 Cal. App. 198, 201-2. The title to the liquor was in plaintiff, the pledgor. The Bank never had any more than a pledgee's rights under the terms of the collateral agreement. As contended by defendants, the storing of the wine in a bonded warehouse and the issuing of warehouse receipts therefor was a transaction for the accommodation of plaintiff and created only a debtor-creditor relationship between plaintiff and the Bank, and did not in any way relieve plaintiff of its liability to pay the tax. The word "held" implies ownership, McFeely v. Commissioner, 296 U. S. 102, 107; but does not always imply possession, Ogle v. Helvering, 77 F. (2d) 338, 339; Commissioner v. Nevius, 76 F. (2d) 109. [41]

Plaintiff's argument that it could not set up its own title "to defeat the pledge of the property by the warehouse to the Bank" is untenable, because if either the Bank or the warehouseman should refuse to deliver the liquor to plaintiff after plaintiff had carried out its contractual obligations, plaintiff could file suit to assert its title and recover its pledged property. 3008 California Civil Code; Bell v. Bank of California, 153 Cal. 234,

238; Brittan v. Oakland Bank, 124 Cal. 282; Hunsaker v. Sturgis, 29 Cal. 142, 145. Plaintiff at all times asserted ownership of the liquor, as shown by its verified inventory and return to the Collector of Internal Revenue.

I conclude that the liquor in question was "held" by plaintiff within the meaning of Section 10(c) on the effective date thereof.

Judgment will go to defendants with costs.

* * * * *

January 10, 1942.

[Endorsed]: Filed Jan. 10, 1942. [42]

[Title of District Court and Cause.]

ORDER ENLARGING TIME TO SERVE AND
LODGE PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Upon motion of the United States Attorney and good cause appearing therefor,

It Is Hereby Ordered that the defendants John V. Lewis and the United States of America shall have to and including Friday, February 6, 1942 within which to serve and lodge proposed Findings of Fact and Conclusions of Law. By previous order time has been enlarged seven days.

A. F. St. SURE

United States District Judge.

Dated: January 23, 1942.

[Endorsed]: Filed Jan. 23, 1942. [43]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial in the above entitled Court, the plaintiff Mount Tivy Winery, Inc., appearing by its Attorney Robert H. Fouke, Esq., and the defendants John V. Lewis and the United States of America appearing and being represented by Frank J. Hennessy, United States Attorney and W. P. Mathewson, Assistant United States Attorney, and the cause having been submitted upon a stipulation of facts and the parties having waived trial by jury, the cause was duly argued by counsel both orally and upon written briefs sub- [44] sequently filed, and the Court now being fully advised in the premises finds the following:

FINDINGS OF FACT

I.

This is an action brought against a former Collector of Internal Revenue by virtue of the provisions of Section 41, sub-division 5, Title 28, United States Code and against the United States of America under the provisions of sub-division 20 of Section 41 of Title 28, United States Code to recover \$15,419.33 in taxes and interest alleged to have been erroneously and illegally assessed and collected.

II.

The plaintiff, a California corporation with its principal place of business in the City of Fresno, County of Fresno, State of California, in the Northern Division of the Southern District of California, engaged in the manufacture, production and sale of wine intended for sale or for use in the manufacture or production of articles intended for sale, in Bonded Winery No. 3620, located at LacJac, Fresno County, State of California, within the First California District, Department of Internal Revenue, Treasury Department, United States of America, and in the Northern Division of the Southern District of California.

III.

The defendant John V. Lewis, a resident of the Southern Division of the Northern District of California, was the duly appointed, qualified and acting United States Collector of Internal Revenue for the First California District at the time of the assessment and collection of the taxes. Prior to the filing of the Complaint the defendant John V. Lewis resigned as Collector of Internal Revenue for the First California Dis- [45] trict.

IV.

On November 13, 1933 the plaintiff and the Fidelity Warehouse Corporation, a California corporation, executed a Field Warehouse Storage Agreement which provided among other things that the Fidelity Warehouse Corporation should furnish the

plaintiff all field warehouse services necessary to the plaintiff's business and that the plaintiff should employ the Fidelity Warehouse Corporation for all field warehouse services required by the plaintiff and further, that the plaintiff would furnish warehouse premises owned or controlled by the plaintiff in which field warehousing was to be conducted. Under the agreement the Fidelity Warehouse Corporation agreed among other things for the consideration therein expressed and subject to the terms and conditions therein contained (1) to maintain a public warehouse in and upon premises leased by the plaintiff to the corporation; (2) to furnish to the plaintiff all field warehouse services necessary to the plaintiff's business; (3) to place a bonded agent and/or bonded watchman in charge of the warehouse and leased premises; and (4) to issue field warehouse receipts upon the property which the plaintiff might store therein; the agreement also provided, however, (a) that the Fidelity Warehouse Corporation should be free from all liability for taxes, assessments, charges or penalties levied, assessed or imposed by a Federal, State, County or Municipal Government or by any other quasi-public or Governmental agency upon or in respect of the wines warehoused under the terms of the agreement; (b) that the plaintiff agreed to render all reports required of the plaintiff or the corporation or of either of them in respect to the commodities warehoused by any and all Governmental agencies; and (c) that at the option of the Fidelity

Warehouse Corporation it could pay [46] all taxes, assessments, charges or penalties and could service, blend, fortify, rectify, handle and care for the warehoused wines and could render all reports at the expense of the plaintiffs in the event the plaintiff failed to do so as agreed in the agreement.

V.

On the same date, November 13, 1933 the plaintiff, pursuant to the provisions of the Field Warehouse Storage Agreement and as authorized by Treasury Decision No. 19, executed in writing, a Field Warehouse Lease, which leased to the Fidelity Warehouse Corporation a portion of a building and all containers therein for use as a warehouse. The building so leased was adjacent to the same premises as plaintiff's Bonded Winery No. 3620, bore the same postoffice box number and was contiguous with and adjoining the structures of plaintiff's Bonded Winery No. 3620.

VI.

On November 25, 1933, as the result of an application made by it on November 20, 1933, under the authority of and pursuant to the laws of the State of California and of the United States and of the regulations issued pursuant thereto and particularly Treasury Decision No. 19 and General Circular No. 141 approved September 16, 1933 which read as follows:

“Bureau of Industrial Alcohol”

T. D. 19

September 16, 1933.

Section 704 of Regulations 2 and Paragraph 9 of Regulations 7, amended.

Treasury Department,

Office of Commissioner of Industrial Alcohol.

To Supervisors of Permits
and Others Concerned:

1. Section 704 of Regulations 2 is amended to read [47] as follows:

Sec. 704. Bonded storerooms. Hereafter no permit will be issued for the establishment of a bonded storeroom for wines unless the proprietor is also duly qualified as the proprietor of a bonded winery; provided, however, the Commissioner may authorize the establishment of public bonded storerooms, known as field warehouses, by responsible warehouse companies, other than winemakers, for the storage of wine for credit purposes when in his judgment such is warranted; Provided that

(1) No person, firm or corporation advancing credit upon the security of such wine or upon the security of warehouse receipts or other instruments issued on account thereof shall have power or authority to possess or use the said wine in any manner or to dispose of it upon foreclosure or otherwise except to a bona

fide holder of a permit entitling the permittee to acquire or otherwise deal with the said wine;

(2) Warehouse receipts or other instruments issued on account of such wine shall not be transferable except to a bona-fide holder of a permit entitling the permittee to acquire or otherwise deal with the wine on account of which the said warehouse receipts or other instruments were issued;

(3) Warehouse receipts or other instruments issued on account of such wine shall show on their face the restrictions contained in numbered paragraphs (1) and (2) hereof.

Proprietors of bonded wine storerooms heretofore established, who are not also producers of wine, will, when all stocks of wine which they now possess have been exhausted, surrender their permits to the supervisor.

2. Paragraph 9 of Regulations 7 is amended to read as follows:

Para. 9. Bonded storerooms may be established only by proprietors of bonded wineries: Provided, however, pursuant to the provisions of Regulations 2 the Commissioner may authorize the establishment of public bonded storerooms, known as field warehouses, by responsible warehouse companies, other than winemakers, for the storage of wines for credit purposes, when in his judgment such is warranted.

J. N. DORAN,
Commissioner of Industrial Alcohol.

Approved: September 16, 1933.

J. EDGAR HOOVER,

Director, Division of Investigation,
Department of Justice.

THOMAS HEWES,

Acting Secretary of the Treasury.

HOMER S. CUMMINGS,

Attorney General. [48]

"Treasury Department
Bureau of Industrial Alcohol

General Circulars, No. 141.

September 16, 1933.

Subject: Opinion of the Attorney General concerning the interpretation of the National Prohibition Act with relation to the storage of wine in public warehouse and the issuance of receipts therefor to banks, etc., for credit purposes.

To Supervisors of Permits
and Others Concerned:

In connection with T. D. No. 19, approved September 16, 1933, there is quoted below an opinion of the Honorable Homer S. Cummings, Attorney General, rendered under date of September 13, 1933, concerning the interpretation of the National Prohibition Act with relation to the storage of wine in public warehouses and the issuance of receipts therefor to banks, etc., for credit purposes.

'The Honorable

The Secretary of the Treasury.

'Sir:

'I have the honor to acknowledge the receipt of your letter of September 11, 1933, from which it appears that the suggestion has been made to your Department that Section 704 of Regulations 2 and Paragraph 9 of Regulations 7, of the Bureau of Industrial Alcohol, be amended so as to permit the Commissioner of Industrial Alcohol to authorize the establishment of public bonded storerooms by responsible warehouse companies, other than wine-makers, for the storage of wines for credit purposes. You state that an essential part of such credit purposes would be some arrangement, made through the issuance of warehouse receipts or otherwise, whereby a lending bank or other institution could acquire title to the warehoused wine for its protection in the event the debtor defaulted in his obligation; and that the proposed arrangement further contemplates that the bank or other lender acquiring title to the warehoused wines would be able to dispose of such wines only to persons lawfully entitled to purchase them.

'You request my opinion as to whether such an arrangement could lawfully be entered into under the National Prohibition Act and its amendments, or whether it would be precluded by 32 Opinions of the Attorney General 392.

'In the opinion referred to the question presented was whether the authority of the Commissioner of Internal Revenue (now the Commissioner of Industrial Alcohol) to issue permits for the sale of wholesale quantities of intoxicating liquor was limited to manufacturers and wholesale druggists. The question was answered in the affirmative and it was held that liquor for nonbeverage purposes could be dealt in only by manufacturers and wholesale and retail druggists. See also Small Grain Distilling & Drug Co. v. Hamilton, 276 Fed. 544. [49] The aforesaid opinion dealt with the sale of liquor by persons regularly engaged in the business of selling liquor. Under the proposed plan now before me the bank or other lender is not to deal in liquor as such. It is an arrangement to create credit facilities for processing the grape crop. The arrangement contemplates the borrowing of money from a bank, governmental loaning agency or other institution by wine manufacturers for the purpose of purchasing grapes for processing. As security for the loan wines are to be deposited pursuant to permit in bonded winery warehouses, or in public banded storerooms, known as field warehouses under the Uniform Warehouse Receipt Acts, operated by responsible warehouse companies and to be established under the above amended regulations. For the wine so deposited ware-

house receipts are to be issued to the bank or other institution covering the warehoused wine for the protection of the lending institution. The warehouse receipts are to show on their face or by proper endorsement that the bank or other lender shall have no power or authority to possess or use the wine in any manner, or to dispose of it or to transfer the warehouse receipts, upon foreclosure or otherwise, except to bona fide permit holders.

'It will thus be seen that under the proposed arrangement the bank would not have physical possession of the wine and would hold title only for credit purposes. The wine is to be warehoused in a public bonded or winery warehouse pursuant to permit and is not to go into consumption or trade except upon foreclosure, and then only upon the presentation of a proper permit by a purchaser permittee.

'In my opinion such an arrangement so circumscribed as to prevent any possible beverage use of the wine would not be contrary to the purpose and intent of the National Prohibition Act, nor be precluded by the opinion referred to above.

Respectfully,
(Signed) HOMER S. CUMMINGS,
Attorney General.'
J. M. DORAN,
Commissioner.'

the Supervisor of Permits issued a permit to the Fidelity Warehouse Corporation to establish and operate a public bonded storeroom in the leased premises to be known as Public Bonded Storeroom No. 3728.

VII.

The leased premises were in the lawful possession and under the control of the Fidelity Warehouse Corporation under the terms and conditions of the lease. Signs were placed [50] over and outside the entrances and inside the leased premises to the effect that the leased premises were registered Public Bonded Storeroom No. 3728 of the Fidelity Warehouse Corporation. Locks were placed upon all entrances to the leased premises by the Fidelity Warehouse Corporation and the key to each of the locks was in the possession and was retained by the agent of the Fidelity Warehouse Corporation in charge of the leased premises. The Fidelity Warehouse Corporation employed a bonded agent to whom detailed printed instructions were given as to his duties. The salary of this agent was paid by the Fidelity Warehouse Corporation. The plaintiff was not permitted access to the leased premises except through the bonded agent of the Fidelity Warehouse Corporation in accordance with the terms of the agreement and then only under the observation and supervision of the bonded agent who kept it locked at all times that he was not personally there and the bonded

agent received and delivered all merchandise at the leased premises.

VIII.

The Field Warehouse Storage Agreement and the Field Warehouse Lease were executed prior to the passage of Section 10 (c) of the Liquor Taxing Act of 1934 and at the time of the execution of these agreements the Fidelity Warehouse Corporation and the plaintiff did not know that Section 10 (c) of the Liquor Taxing Act of 1934 was contemplated or would be enacted into law and neither before nor at the time of the execution of these agreements did either or both of these parties negotiate, contemplate or execute the agreements in order to avoid or evade the provisions of Section 10 (c) of the Liquor Taxing Act of 1934.

IX.

During the months of November and December, 1933 and [51] before January 12, 1934 plaintiff removed 484,000 gallons of fortified wine from Bonded Winery No. 3620 and stored it in Public Bonded Storeroom No. 3728 and in writing requested the Fidelity Warehouse Corporation to issue four original wine warehouse receipts negotiable in form, for a total of 484,000 gallons of wine to the Bank of America National Trust & Savings Association, Fresno Branch, or order (hereinafter referred to as "the Bank") as follows: One for 211,000 gallons dated November 29, 1933, numbered 01304; the second for 123,000 gallons dated Decem-

ber 4, 1933, numbered 01307; the third for 119,000 gallons dated December 22, 1933, numbered 01312; and the fourth for 31,000 gallons dated January 6, 1934, numbered 01316; which receipts were issued and executed in the name of and were delivered at the request of the plaintiff on those dates to the Bank by the Fidelity Warehouse Corporation.

X.

The warehouse receipts with the exception of the number, date and wine described therein read as follows:

“Original No. 01304

Negotiable Warehouse Receipt

Issued By

Fidelity Warehouse Corporation

Main Office, 351 California St.

San Francisco, California.

November 29, 1933.

This Is to Certify, That this Corporation has received for storage in its warehouse at Lae Jae, California from Mount Tivy Winery, Inc. deliverable to Bank of America National Trust & Savings Association, Fresno Branch, or order, in apparent good order, except as noted hereon (contents, condition and quality unknown) the following described property, subject to all the terms and conditions contained herein and payment of all storage and other charges.

Tank Style Said to Contain Said to Contain

* * * * *

'This Fidelity Warehouse Company warehouse receipt is issued pursuant to permit No. P-18, issued by [52] the Bureau of Industrial Alcohol, United States Treasury Department, in accordance with section 704 of Regulations 2 and Paragraph 9 of Regulations 7, as amended, which authorized the issuance of this warehouse receipt.'

"All goods are stored and handled subject to the rules, regulations, rates and charges as set forth in that certain lease agreement existing between the above named depositor and Fidelity Warehouse Corporation; warehouseman hereby claims lien on above described goods for storage and other charges as set out in the said lease agreement.

Rates do not include fire or other insurance. Warehouseman does not arrange for insurance unless instructed in writing to do so. The location of merchandise as shown on this warehouse receipt is not given for insurance purposes, and all liability is disclaimed for error or insufficiency in the location, if such location is used.

Warehouseman is not responsible for loss or damage caused by fire (from any cause), frost or change of weather, riots, strikes, insurrections, or from inherent or perishable qualities of the merchandise, or other causes beyond his control; and is not responsible for loss or damage caused by leakage, pilferage, ratage, theft,

vermin or water, unless such loss or damage be caused by the failure of the warehouseman to exercise ordinary care and diligence.

These goods will be delivered upon surrender of this receipt, properly endorsed, and the payment of all charges and liabilities due the undersigned warehouseman.

The Wine Covered by This Warehouse Receipt Cannot be Possessed, or Used in any Manner or Disposed of or Transferred Except to a Bona Fide Permittee of the Bureau of Industrial Alcohol.

FIDELITY WAREHOUSE
CORPORATION,

By

Assistant Secretary."

XI.

The 484,000 gallons of fortified wine deposited with the Fidelity Warehouse Corporation evidenced by the warehouse receipts and stored in the warehouse on January 12, 1934 had been produced by the plaintiff at its Bonded Winery No. 3620 prior to January 11, 1934 and contained 147,927.08 proof gallons of brandy previously withdrawn from a distillery and previously used in the fortification of the wine produced by the plaintiff. Prior to January 11, 1934 and at the time of the withdrawal and use of the brandy in fortifying the wine there had been assessed against the plaintiff a tax of [53] 10 cents per proof gallon as required by the Internal Revenue law of 1918 as amended.

XII.

On January 12, 1934 the plaintiff had in its Bonded Winery No. 3620, 220,297.34 gallons of fortified wine. This wine had likewise been produced by the plaintiff in its winery and contained 61,863.88 proof gallons of brandy which had also previously been withdrawn from a distillery for the fortification of the wine produced by the plaintiff and upon this brandy plaintiff had been assessed a tax at the rate of 10 cents per proof gallon as required by the Internal Revenue law of 1918 as amended. The plaintiff made no claim for the abatement or refund of the tax assessed by the Collector of Internal Revenue on this wine and the plaintiff does not seek to recover that tax in this action.

XIII.

Upon receipt of the wine from the plaintiff the warehouse company placed it in storage tanks located upon the leased premises and caused to be placed upon the tanks in which the wine was stored, stock cards showing that the wine was warehoused to the Bank, the description of the wine, the date of the warehousing, the negotiable warehouse receipt number issued against the wine and the quantity and quality of the wine stored therein.

XIV.

In accordance with the provisions of the Field Warehouse Storage Agreement and in accordance with an understanding between the plaintiff and

the Fidelity Warehouse Corporation the plaintiff was from time to time permitted to have access to the bonded storeroom for the purpose of servicing and caring for the wine during the period the wine was stored in the bonded storeroom. [54]

XV.

All of the wine except as otherwise specified herein was in the physical possession and under the physical control of the Fidelity Warehouse Corporation and was held by it as a bonded warehouseman in its Public Bonded Storeroom No. 3728 under the laws of the State of California, and United States of America, and the rules and regulations of the Treasury Department including T.D.#19 and the agreements between it and the plaintiff, the plaintiff and the Bank and it and the Bank. Prior to January 12, 1934 and prior to the actual issuance of the warehouse receipts the Bank from time to time extended unsecured bank credits to the plaintiff. As wine was produced and delivered by the plaintiff to the warehouse company the warehouse company issued the warehouse receipts described above covering the wine. These warehouse receipts were delivered to and were received by the Bank. At the request of the Bank, the plaintiff executed several promissory notes payable to the Bank and executed a collateral agreement with the Bank which read as follows:

“In Consideration of all financial accommodations given, or to be given, or continued, to the undersigned Mount Tivy Winery, Inc., a

California corporation, by Bank of America National Trust & Savings Association, (hereinafter called the Bank), and as collateral security for the payment of any indebtedness, obligation or liability of the undersigned to said Bank now or hereafter existing, matured or to mature, absolute or contingent, and whenever payable, including such as may arise from endorsements, guarantees, acceptances or paper discounted by said Bank, or held by said Bank or taken as security for any loans or advances of any sort whatever, and including overdrafts and indebtedness of the undersigned to said Bank on account of collections or paper received for collection, and the interest which may accrue on any thereof and expenses which may be incurred by the Bank, in the collection of any thereof including attorney fees, the undersigned does hereby assign, transfer to, and deposit with the said Bank, all property this day delivered by the undersigned to the Bank, or which may now be held by the Bank, or which may hereafter be delivered by the undersigned to the Bank during the existence of this agreement, and of which property the undersigned is the owner, the same being stored, deposited and cared for at [55] the risk and expense of the undersigned. The power of sale and other powers hereinafter given shall apply to all collaterals of any kind, nature or description, including all moneys, negotiable

instruments, bonds, stock, commercial paper, credits, choses in action, claims or demands of every kind, nature and description at any time during the existence of this agreement in possession or control of said Bank or any of its agents or correspondents, or in transit to it by mail or carrier, belonging to, for the account of, or subject to the order of the undersigned.

Full power is hereby given to said Bank to collect any and all amounts which may become due upon any of the said securities which may be so deposited with it, and to apply the amounts so collected to the indebtedness or any part of said indebtedness, and to endorse on behalf of and in the name of the undersigned any and all of said collaterals and securities and to give receipts therefor in the name of the undersigned for any amounts which it may receive thereon, or upon any of said collaterals, but said Bank shall be under no obligation to collect any such sums or amounts.

Said Bank is hereby authorized to cause to be transferred to its own name, or to the name of any other person or corporation, as pledgee or trustee or otherwise, any certificates of stock, warehouse receipt or other instruments which are now or may hereafter be deposited with it by the undersigned as security as aforesaid; and such transferee may exercise all of the rights and privileges in connection with

said securities to which said transferee may be entitled by virtue of being the holder of record thereof, in addition to the rights or privileges otherwise granted to said Bank hereunder. But said Bank or said transferee shall not be obliged to exercise any of said rights or privileges.

If, with the consent of said Bank, the undersigned shall substitute or exchange other securities in place of the collaterals above specified, then all of the rights or privileges of said Bank, and the obligation on the part of the undersigned shall be forthwith applicable to said substituted or exchanged securities, to same extent as the property originally pledged or held as collateral as aforesaid hereunder.

In the event either of a failure in business or insolvency or bankruptcy or a general assignment by the undersigned, or a failure to pay the principal or interest on any indebtedness or liability according to the terms of the contract under which the same was incurred, then all the liabilities of the undersigned to the Bank shall, at the option of the Bank, become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by the instrument evidencing any of said liabilities; and in any such event, the undersigned does hereby constitute and appoint said Bank, its successors or assigns, the attorney in fact of the undersigned, irrevocable, with full pow-

ers of substitution and revocation, and does hereby authorize, empower and instruct the said attorney, or assigns to sell without any previous demand, or demand of performance, upon the undersigned, and with or without notice to the undersigned, at its option, the whole or any part of said securities, either at public or private [56] sale or at Broker's Board, at its discretion, and without any advertisement or notice of such sale, and to deliver the same to the purchaser or purchasers thereof, the Bank being at liberty to become the purchaser if the sale is public or private or at Broker's Board and to hold any and all property so purchased discharged of any rights of redemption whatever. The undersigned hereby expressly waives the provisions of Section 3006 of the Civil Code and all rights thereunder. After deducting all legal and other costs, expenses and charges of every kind incurred in the collection, sale and delivery, or in the preservation, of said property or any part thereof, said Bank shall apply the residue of the proceeds of the sale to the payment of all of the aforesaid indebtedness, to-wit: The indebtedness and liabilities and every part thereof, payment whereof is hereby intended to be secured, and the interest thereon; and should there be any surplus of said proceeds after the payment of said notes, expenses, charges and said indebtedness and liabilities, and every part thereof, it shall be subject to the order of the undersigned.

In like manner the undersigned does agree to pay on demand in lawful money of the United States of America to the said Bank whatever balance may be due after said securities have been sold and application of the proceeds as above provided has been made.

In the case of the deterioration of any of the above mentioned securities in whole or in part, or any fall or depreciation in the market value of the same, the undersigned does hereby authorize said Bank, at its option, to sell and dispose of said securities, or any part hereof, as above provided, at any time before or after the maturity or maturities of said indebtedness, obligation or liability of the undersigned to said Bank within the contemplation hereof, or any of them, in which event the undersigned does specifically waive any notice whatsoever of such depreciation or fall in market value, any and all demand upon the undersigned to redeem or otherwise protect such security, and any and all notice of intention on the part of said Bank to sell said securities, or any of them, the purport hereof being that the undersigned does agree and authorize said Bank to sell and dispose of said securities, or any of them, in the event of such depreciation or fall in market value, without any notice to or demand upon the undersigned and without any notice or advertisement whatsoever and without reference to the maturity or maturities of any of the said

indebtedness, obligations or liabilities secured hereby; and the undersigned does hereby give and grant unto said Bank the same rights, privileges and powers regarding said securities and their sale as are hereinbefore given by the undersigned in the event of other default hereunder or by the terms of the instrument evidencing the same.

It Is Further Agreed that these presents constitute a continuing agreement applying to any and all future, as well as to existing transactions, between the undersigned and said Bank, and that the powers of sale, and other powers, rights and privileges hereinabove given, are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

In Witness Whereof, the said Corporation has caused this collateral pledge agreement to be executed under its Corporate Name and Seal by its officers thereunto duly authorized by resolution of its Board of Directors. [57] at Fresno, California, this 12th day of December, A.D. 1933.

(Seal) MOUNT TIVY WINERY, INC.

(Seal)

By (signed) L. POWERS, Jr.
President.

(Seal)

By (signed) M. T. McELLIGOTT,
Secretary."

XVI.

The 484,000 gallons of fortified wine thus delivered to the warehouse company for storage in Public Bonded Storeroom No. 3728 by the plaintiff prior to January 11, 1934 was produced and intended for sale and was subsequently sold in the following manner:

XVII.

The plaintiff secured a prospective purchaser for the wine and notified the Bank of the proposed terms of the sale. In the event the purchaser and the terms of sale were satisfactory to the Bank the sale was consummated with the approval of the Bank upon a cash or credit basis. As a part of the same general sales transaction the Bank would then execute and deliver to the Fidelity Warehouse Corporation an order for warehouse release covering the wine sold to the purchaser. The warehouse receipts were then either delivered to the warehouse company for cancellation or for endorsement thereon of the amount of the wine sold or for the issuance of a new warehouse receipt, negotiable in form, in the name of and to the order of the Bank for the remaining unsold quantity of wine covered by the warehouse receipt and the re-delivery to the Bank of the cancelled, endorsed or new receipt or the Bank would deliver both the order for warehouse release and the warehouse receipt to the purchaser or the warehouse company [58] subject to the purchaser's further order or endorsement. Subject to the order of the pur-

chaser wine sold to it was thereafter prepared for shipment to the purchaser or its order on the warehouse premises by the plaintiff and the warehouse corporation made an entry on Form 702, a report filed monthly with the defendant by the warehouse company, indicating the release of the wine to the plaintiff and the wine was received by the plaintiff for the purposes mentioned for the account of the purchaser and subject to the order of the purchaser.

XVIII.

The receipts were in the possession and control of the Bank at all times except when surrendered to the warehouse company for the release of wine all of which was subsequently released upon the order of the Bank. The receipts were at all times in the name of the Bank and were never endorsed or negotiated by it.

XIX.

Prior to January 12, 1934 the plaintiff had not defaulted upon its notes nor had any of the other conditions set forth in the collateral pledge agreement under which the Bank could properly demand the wine from the warehouseman matured nor had the Bank negotiated any of the warehouse receipts nor had it disposed of them or of the wine under any of the powers conferred upon it by the collateral pledge agreement.

XX.

The 484,000 gallons of wine so removed and

stored was the first wine to be stored in Public Bonded Storeroom No. 3728 and remained the only wine so removed and stored by the plaintiff or anyone else up to and including January 12, 1934. [59]

XXI.

The Bank did not pay personal property taxes or any taxes imposed by the Liquor Taxing Act of 1934 upon the wine covered by the warehouse receipts. All taxes on the wine were paid by the plaintiff in accordance with and pursuant to the agreement with the warehouse corporation.

XXII.

In accordance with and pursuant to instructions from the Commissioner of Internal Revenue the defendant John V. Lewis for and on behalf of the United States of America caused to be delivered to the plaintiff a mimeographed circular dated January 15, 1934, entitled 'Field Tax on Distilled Spirits, Wine, Cordials, etc.' which provided:

"Copy
page 1.

Treasury Department
Office of the Collector of Internal Revenue
San Francisco

Floor Taxes on Distilled Spirits, Wines,
Cordials, Etc.

January 15, 1934.

To Whom It May Concern:

The 'Liquor Taxing Act of 1934' became a law containing provisions for floor taxes on

Distilled Spirits, Wines, Cordials, Etc., which are held and intended for sale or for use in the manufacture or production of any article intended for sale on the effective date of the Act —January 12, 1934, at the commencement of business. A supply of return forms 758 will be forwarded to you as soon as received from the printer. Your attention is directed, therefore, to the following steps, which should be taken with the greatest possible dispatch:

As time will not permit printing and distribution of inventory blanks for the purpose, each such taxpayer should immediately prepare sheets of paper which should not be larger than 10½ x 16 inches but as many sheets as necessary may be used. Each kind of spirits, wines, etc., should be listed separately, and in the case of distillers' or wine-makers' original packages or cases of bottled-in-bond spirits, the serial numbers of the packages or cases and name of distiller or winemaker should be shown; also the wine gallons, proof gallons of distilled spirits, alcohol and rectified spirits should be given, and the wines should be separated by alcoholic content, i.e., the quantity in wine gallons containing 14 per cent alcohol or less, quantity containing [60] more than 14 per cent and not more than 21 per cent alcohol, quantity containing more than 21 per cent and not more than 24 per cent alcohol, and quantity containing more than 24 per cent alcohol,

should be stated. Carbonated wines, cordials and similar compounds containing more than 24 per cent alcohol should be listed separately, giving the quantity of each kind in wine gallons. The name of the rectifier or bottler or rectified or commercially bottled spirits should be given, together with the wine gallons, proof and proof gallons.

Special care must be taken to also enter on a separate list all goods not on premises of the taxpayer but held by the taxpayer and stored elsewhere, or consigned direct to him and in transit on the date the Act takes effect, giving the name of the consignor and any goods consigned by the party making the inventory to other persons where the title has not been transferred to the consignee on the date the Act becomes effective, giving the name of the consignee.

As soon as the returns, Form 758, are received, fill in the heading on page 1 for each distiller, proprietor of industrial alcohol plant, bonded warehouse, tax-free warehouse or agency, winery, bonded winery storeroom, wholesale liquor dealer, retail liquor dealer, rectifying plant, and manufacturer having alcohol or other distilled spirits or wines on hand for use in the manufacture or production of other articles.

The returns on Form 758 are required to be made in triplicate and the original and dupli-

cate copies filed within 30 days after the effective date of the Act (I.e. on or before February 10, 1934) a copy of the inventory to be attached to each copy of Form 758.

The tax shown to be due must be paid within 30 days after the effective date of the Act, except that the time for payment of this tax may be extended to a date not exceeding seven months after the effective date of the Act, upon the filing of a bond for payment in such form and amount and with such sureties as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury may prescribe.

The following schedule shows the old rate together with the new rate of tax and the increased difference.

Wine	Old Rate	New Rate	Increase
Not more than 14% alcohol.....	4c	10c	6c per gal.
More than 14% and not exceeding 21%...	10c	20c	10c "
More than 21% and not exceeding 24%...	25c	40c	15c "

More than 24% of alcohol by volume classed as Distilled Spirits at \$2.00 per proof gallon.

Sparkling Wines and Champagne	Old Rate	New Rate	
Each half pint or fraction thereof.....	12c	5c	[61]

Artificially Carbonated Wines	Old Rate	New Rate	
Each half pint or fraction thereof.....	6c	2½c	

Distilled Spirits	Old Rate	New Rate	Increase
	1.10	2.00	.90

On each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

The above rates are subject to official confirmation from Washington.

Inventory returns should be mailed to the Collector of Internal Revenue, Room 114, Custom House, San Francisco, California.

(signed) RICHARD NICKELL,
Deputy Collector in Charge"

XXIII.

The plaintiff on February 6, 1934, pursuant thereto and in the belief that a tax was due the United States of America and pursuant to the further belief that it was legally required so to do returned to the defendant John V. Lewis an inventory and return on Form 756, a form prepared and supplied by the defendants to the plaintiff on which form the plaintiff inventoried and returned the fortified wine and the brandy contained therein in the possession of it as the producer thereof and held by it for sale in the use or manufacture or production of any article intended for sale on January 14, 1934.

XXIV.

Form 756 as returned by the plaintiff read as follows: [62]

Form 756 Treasury Department

Internal Revenue Service

Name—Mount Tivy Winery, Inc.

District—11th Permissive

Location of Bonded Premises—Lac Jac, Calif.

Bonded Winery No. 3620

**INVENTORY AND RETURN OF FORTIFIED WINES
AND BRANDY CONTAINED THEREIN IN THE POS-
SESSION OF THE PRODUCER AND HELD FOR
SALE OR USE IN THE MANUFACTURE OR PRO-
DUCTION OF ANY ARTICLE INTENDED FOR SALE
ON JANUARY 12, 1934.**

Kind of Wine	Wine Gallons	Date of Fortification	Per Cent of Alcohol in Wine After Fortification	Per Cent of Brandy in Fortified Wine	Proof Gallons of Brandy in the Wine
Muscat	17,036.38	10/30/33	19.20	11.65	3,983.03
Muscat	17,020.16	10/31/33	19.00	15.42	5,247.35
Port	20,448.06	11/1/33	19.90	14.80	6,052.50
Muscat	13,146.87	11/3/33	18.20	18.65	4,904.32
Port	23,631.95	11/4/33	18.10	19.70	9,311.04
Port	21,859.29	11/6/33	20.30	21.41	11,359.14
Port	27,520.45	11/9/33	21.70	18.91	10,406.51
Port	25,485.98	11/13/33	21.10	14.82	7,554.27
Muscat	26,798.57	11/14/33	21.70	19.42	10,400.45
Port	27,456.50	11/16/33	22.60	22.48	11,247.53
Port	25,958.85	11/17/33	21.50	17.38	9,025.15
Muscat	26,244.33	11/19/33	21.40	16.73	8,783.59
Port	26,052.89	11/22/33	21.30	16.30	8,495.84
Sherry	26,580.27	11/23/33	21.10	12.13	6,447.36
Anglica	27,449.75	11/24/33	19.40	18.58	10,200.90
Port	21,072.55	11/27/33	20.00	10.50	4,427.94
Sherry	14,485.48	11/29/33	19.90	10.18	2,948.24
Sherry	25,628.65	11/30/33	21.30	10.79	5,627.80
Port	17,454.59	12/3/33	21.00	16.41	5,729.80
Sherry	15,259.82	12/5/33	19.10	9.45	2,884.16
Sherry	19,676.99	12/7/33	20.60	11.55	4,547.31
Sherry	18,218.80	12/9/33	20.40	11.02	4,013.51
Sherry	18,086.62	10/10/33	21.80	13.85	5,011.16
Sherry	26,751.24	12/12/33	23.50	13.27	7,100.35

Kind of Wine	Wine Gallons	Date of Fortification	Per Cent of Alcohol in Wine After Fortification	Per Cent of Brandy in Fortified Wine	Proof Gallons of Brandy in the Wine
Sherry	26,920.53	12/13/33	22.20	12.85	6,926.12
Sherry	20,002.83	12/17/33	22.30	10.79	4,317.71
Sherry	25,735.39	12/19/33	21.00	9.55	4,904.01
Sherry	26,776.73	12/26/33	22.60	11.56	6,083.84
Museat	15,082.02	1/4/34	19.40	10.84	5,269.22
Sherry	15,253.45	1/4/34	19.40	6.05	1,846.01
Claret	1,364.00				
	660,470.97		Total,	194,963.16	
			Rate of Floor Tax	.10	
			Amount of Tax Due	19,496.32	

I swear (or affirm) that the above is a true and complete inventory of all fortified wines produced and held for sale or use in the manufacture or production of any article intended for sale by the person, firm, or corporation named above on the day specified.

(Signed) MOUNT TIVY WINERY, INC.
By (signed) L. POWERS, Jr.

President.

(State whether owner,
member of firm, or, if
officer of corporation,
give title).

Sworn to and subscribed before me this 6th day of February, 1934

(Signed) TARANCE S. MAGEE,
(Name)

Notary Public

(Title)

Fresno County, Calif. [63]

XXV.

This inventory showed that plaintiff held 639-, 106.97 gallons of wine containing 194,963.16 proof gallons of brandy upon which a tax was believed to be due of \$19,496.32.

XXVI.

On February 10, 1934 the plaintiff paid the defendant John V. Lewis as Collector of Internal Revenue the sum of \$2,000.00. Subsequently on February 17, 1934 the plaintiff addressed a letter to the defendant John V. Lewis in which it stated that the \$2,000.00 paid to him represented a tax liability on brandy in fortified wine in the hands of the plaintiff and that the remaining balance of \$17,496.32 represented the tax on the brandy in the fortified wine held by the Fidelity Warehouse Company, and asserted that the Fidelity Warehouse Company held full possession and control of the wine and brandy as a bailee or warehouseman for the Bank of America. Plaintiff in the letter further protested the payment of any tax assessed or levied against the wine or brandy held by the Fidelity Warehouse Corporation upon the ground that the wines and brandy were not held by the producer on the date the Internal Liquor Taxing Act of 1934 became effective.

XXVII.

On April 11, 1934 the Commissioner of Internal Revenue assessed against the plaintiff taxes in the sum of \$19,496.32, the amount returned by the plaintiff on Form 756.

XXVIII.

On November 10, 1934, after the Commissioner of Internal Revenue had rejected claims in abatement of \$17,496.32 in taxes submitted by the plaintiff, the plaintiff upon demand by the defendant John V. Lewis paid to him the sum of \$17,496.32, the unpaid balance of the assessed tax and the sum of \$1,558.53, the amount of the interest accrued on the unpaid balance of the tax [64] as of November 10, 1934, a total of \$19,054.85, which amount together with the \$2000.00 previously paid made a grand total of \$21,054.85.

XXIX.

On August 28, 1935 the plaintiff filed with the defendant John V. Lewis a claim for the refund of \$15,419.33, which claim for refund was rejected by the Commissioner of Internal Revenue on July 29, 1936 by a registered letter bearing that date.

XXX.

The plaintiff filed the complaint on July 28, 1938 and thereafter served the United States Attorney on January 30, 1939 and served he Attorney General of the United States on February 28, 1939. The service on the United States Attorney and the Attorney General of he United States were made more than two years after the date of the mailing of the notice of rejection of the claim for refund by the Commissioner of Internal Revenue.

CONCLUSIONS OF LAW

I.

That the action against the United States of America was not commenced until plaintiff served a copy of its complaint upon the United States Attorney and the Attorney General of the United States.

II.

That the action against the United States of America was not commenced within the two-year limitation allowed by 26 USCA § 3772 (a)(2).

III.

That the Court does not have jurisdiction of the action against the defendant the United States of America. [65]

IV.

The Court does have jurisdiction of the action against the defendant John V. Lewis.

V.

That § 10 (c) of The Liquor Taxing Act of 1934 levies an excise tax.

VI.

That § 10(c) of The Liquor Taxing Act of 1934 does not violate Art. I, Sec. 2, Cl. 3, and Art. I, Sec. 9, Cl. 4 of the United States Constitution.

VII.

That § 10(c) of The Liquor Taxing Act of 1934

does not violate the Fifth Amendment to the Constitution of the United States.

VIII.

That within the meaning of Section 10 (c) of The Liquor Taxing Act of 1934, 26 USCA Section 451 (b), 1934 Cumulative Annual Pocket Part, the plaintiff was the producer of the 484,000 Gallons of fortified wine stored with the Fidelity Warehouse Corporation on January 12, 1934 in Public Bonded Storeroom No. 3728.

IX.

That within the meaning of Section 10(c) of The Liquor Taxing Act of 1934, 26 USCA 451 (b), 1934 Cumulative Annual Pocket Part, the plaintiff held the 484,000 gallons of fortified wine stored with the Fidelity Warehouse Corporation on January 12, 1934 in Public Bonded Storeroom No. 3728.

X.

That within the meaning of Section 10(c) of the Liquor Taxing Act of 1934, 26 USCA 451 (b), 1934 Cumulative Annual Pocket Part, the plaintiff intended to sell the 484,000 gallons of fortified wine stored with the Fidelity [66] Warehouse Corporation on January 12, 1934 in Public Bonded Storeroom No. 3728, or use it in the manufacture or production of articles intended for sale.

XI.

That under the provisions of § 10 (c) of The Liquor Taxing Act of 1934, 26 USCA 451(b), 1934 Cumulative Annual Pocket Part the plaintiff was

liable for an Internal Revenue Tax of \$14,792.71 on the 484,000 gallons of fortified wine stored with the Fidelity Warehouse Corporation on January 12, 1933 in Public Bonded Storeroom No. 3728.

XII.

That on October 31, 1934 the plaintiff was liable for \$1,558.53 in interest on the unpaid Internal Revenue Taxes for which it was liable under the provisions of § 10 (c) of The Liquor Taxing Act of 1934, 26 USCA 451 (b), 1934 Cumulative Annual Pocket Part.

XIII.

That the \$15,419.33 paid by the plaintiff to the defendants and sought to be recovered in this action was rightfully and correctly paid and the plaintiff is not entitled to its return or any portion thereof.

XIV.

That the defendant John V. Lewis is entitled to a judgment of dismissal and for his costs of suit herein incurred.

XV.

That the defendant United States of America is entitled to a judgment of dismissal and for its costs of suit herein incurred.

Dated: This 20th day of February, 1942.

A. F. ST. SURE,

United States District Judge.

Receipt of Service.

[Endorsed]: Filed Feb. 20, 1942. [67]

In the Southern Division of the United States District Court for the Northern District of California.

No. 20473-S

MOUNT TIVY WINERY, INC., a California Corporation,

Plaintiff,

vs.

JOHN V. LEWIS, Collector of Internal Revenue,
First California District,

JOHN DOE, Collector of Internal Revenue, First
California District,

UNITED STATES OF AMERICA, FIRST DOE,
SECOND DOE, and THIRD DOE,
Defendants,

JUDGMENT ON FINDINGS

This cause came on regularly for trial upon the 12th day of November, 1941, before the Court sitting without a jury, trial by jury having been waived by oral stipulation, Robert H. Fouke, Esq., appearing as Attorney for plaintiff, and Frank J. Hennessy, United States Attorney and W. F. Mathewson, Assistant United States Attorney appearing as Attorneys for the defendants the United States of America and John V. Lewis, and the cause having been submitted upon a Stipulation of Facts for consideration and decision, and the [68] Court after due deliberation having rendered

its decision and filed its Findings and ordered that judgment be entered in accordance with the findings;

Now, Therefore, by virtue of the law and by reason of the findings aforesaid, It Is Ordered by the Court:

I.

That the defendant John V. Lewis be and he is hereby dismissed.

II.

That the defendant the United States of America be and it is hereby dismissed.

III.

That this action be and it is hereby dismissed and that the plaintiff recover nothing.

IV.

That the plaintiff pay to the defendants and each of them their costs of suit herein expended in the amounts to be taxed by the Clerk.

Judgment entered this 3rd day of April 1942.

A. F. ST. SURE,

United States District Judge.

Approved as to form as provided by Rule 22.

ROBERT H. FOUGE,

Attorney for Plaintiff.

[Endorsed]: Filed April 3, 1942. [69]

In the Southern Division of the United States District Court for the Northern District of California.

No. 20464-R

CALIFORNIA WINERIES AND DISTILLERIES, INC., a California corporation,
Plaintiff,

vs.

JOHN V. LEWIS, Collector of Internal Revenue,
First California District, JOHN DOE, Collector
of Internal Revenue, First California District,
UNITED STATES OF AMERICA,
FIRST DOE, SECOND DOE and THIRD
DOE,

Defendants.

No. 20465-L

FRESNO WINERY INC., a California Corporation formerly known as Elsinore Winery, Inc., a corporation, and LUCERNE WINERY, INC., a corporation,

Plaintiff,

vs.

JOHN V. LEWIS, Collector of Internal Revenue,
First California District, JOHN DOE, Collector
of Internal Revenue, First California District,
UNITED STATES OF AMERICA,
FIRST DOE, SECOND DOE and THIRD
DOE,

Defendants.

Mount Tivy Winery

No. 20466-R

SANTA LUCIA WINERIES, INC., a California corporation,

Plaintiff,

vs.

JOHN V. LEWIS, Collector of Internal Revenue,
First California District, JOHN DOE, Collector
of Internal Revenue, First California Dis-
trict, UNITED STATES OF AMERICA,
FIRST DOE, SECOND DOE and THIRD
DOE,

Defendants.

No. 20467-S

CHARLES DUBBS and SAMUEL CAPLAN, co-
partners doing business under the first name
and style of ALTA WINERY AND DISTIL-
LERY,

Plaintiffs,

vs.

JOHN V. LEWIS, Collector of Internal Revenue,
First California District, JOHN DOE, Collector
of Internal Revenue, First California Dis-
trict, UNITED STATES OF AMERICA,
FIRST DOE, SECOND DOE and THIRD
DOE,

Defendants.

No. 20474-W

CALIFORNIA GROWERS WINERIES, INC.,
a California corporation,

Plaintiff,

vs.

JOHN V. LEWIS, Collector of Internal Revenue,
First California District, JOHN DOE, Collec-
tor of Internal Revenue, First California Dis-
trict, UNITED STATES OF AMERICA,
FIRST DOE, SECOND DOE and THIRD
DOE,

Defendants.

[71]

No. 21113-L

ST. GEORGE WINERY, a California corpora-
tion,

Plaintiff,

vs.

JOHN V. LEWIS, Collector of Internal Revenue,
First California District, JOHN DOE, Collec-
tor of Internal Revenue, First California Dis-
trict, UNITED STATES OF AMERICA,
FIRST DOE, SECOND DOE and THIRD
DOE,

Defendants.

ORDER FOR JUDGMENT

These are companion cases to Mount Tivy Winery, Inc., v. John V. Lewis, Collector of Internal Revenue, etc., United States of America, et al., No. 20473-S, and are governed by the decision made in that case this day.

On the jurisdictional question, I find that in three cases, i. e., No. 20464-R, No. 20474-W, and No. 21113-L, service on defendant United States was made within the two-year limitation, and therefore suit against the United States would stand. However, in view of my decision against plaintiffs, this becomes immaterial.

It is therefore Ordered:

That plaintiffs take nothing by their actions, and that defendants be dismissed with costs in each.

Counsel for defendants may prepare and submit [72] findings of fact, conclusions of law, and judgment in each case, in accordance herewith.

Dated: January 10, 1942.

A. F. ST. SURE,

United States District Judge.

[73]

[Title of District Court and Cause.]

**NOTICE OF APPEAL OF MOUNT TIVY
WINERY, INC.**

Notice Is Hereby Given that Mount Tivy Winery, Inc., a California Corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 3, 1942.

Dated: July 3, 1942.

ROBERT H. FOUKE,

Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed July 3, 1942. [74]

[Title of District Court and Cause.]

NOTICE OF APPEAL OF CALIFORNIA
WINERIES AND DISTILLERIES, INC.

Notice Is Hereby Given that California Wineries and Distilleries, Inc., a California Corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 3, 1942.

Dated July 3, 1942.

ROBERT H. FOUKE,
Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed July 3, 1942. [75]

[Title of District Court and Cause.]

NOTICE OF APPEAL OF
FRESNO WINERIES, INC.

Notice Is Hereby Given that Fresno Winery, Inc., a California corporation formerly known as Elsinore Winery, Inc., a corporation, and Lucerne Winery, Inc., a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 3, 1942.

Dated July 3, 1942.

ROBERT H. FOUKE,
Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed July 3, 1942. [76]

[Title of District Court and Cause.]

NOTICE OF APPEAL OF SANTA LUCIA
WINERIES, INC.

Notice Is Hereby Given that Santa Lucia Wineries, Inc., a California Corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 3, 1942.

Dated July 3, 1942.

ROBERT H. FOUKE

Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed July 3, 1942. [77]

[Title of District Court and Cause.]

NOTICE OF APPEAL OF CHARLES DUBBS
AND SAMUEL CAPLAN

Notice Is Hereby Given that Charles Dubbs and Samuel Caplan, co-partners doing business under the firm name and style of Alta Winery and Distillery, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 3, 1942.

Dated July 3, 1942.

ROBERT H. FOUKE

Attorney for Plaintiffs and
Appellants.

[Endorsed]: Filed July 3, 1942. [78]

[Title of District Court and Cause.]

**NOTICE OF APPEAL OF CALIFORNIA
GROWERS WINERIES, INC.**

Notice Is Hereby Given that California Growers Wineries, Inc., a California Corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 3, 1942.

Dated July 3, 1942.

ROBERT H. FOUKE

Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed July 3, 1942. [79]

[Title of District Court and Cause.]

**NOTICE OF APPEAL OF ST. GEORGE
WINERY**

Notice Is Hereby Given that St. George Winery, a California Corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 3, 1942.

Dated July 3, 1942.

ROBERT H. FOUKE

Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed July 3, 1942. [80]

[Title of District Court and Cause.]

STIPULATION AND ORDER CONSOLIDATING CASES ON APPEAL, ETC.

Whereas, pursuant to stipulation and order of the above entitled Court, the above entitled actions were consolidated for all purposes, including hearing, trial and judgment in the above action entitled "Mount Tivy Winery, Inc., a California Corporation, plaintiffs, vs. John V. Lewis, Collector of Internal Revenue, First California District, John Doe, collector of Internal Revenue, First California District, United States of America, First Doe, Second Doe and Third Doe, defendants", in Proceeding No. 20473-S; and,

Whereas, separate Stipulations of Facts, Findings of Facts and Conclusions of Law and Judgments were filed in each of the above actions based upon the facts therein contained but predicated upon the determination as to the law applicable thereto by the above entitled Court, which law applicable thereto, insofar as any appeal to the Circuit Court of Appeals is involved, will be the same in each and every one of the above entitled cases; and,

Whereas, all parties plaintiff and defendant are represented by Robert H. Fouke and Frank J. Hennessy, United States Attorney, respectively;

Now Therefore it Is Hereby Stipulated by and between each and every plaintiff and defendant above named, by and through their respective attorneys as follows:

1. That for all purposes, including appeal, appeal bond, hearing, trial, judgment and costs, each and every one of the above entitled actions may be, and, pursuant to order of Court endorsed hereon, are consolidated with and in the above entitled action entitled "Mount Tivy Winery, Inc., a California corporation, plaintiff, vs. John V. Lewis, Collector of Internal Revenue, First California District, John Doe, Collector of Internal Revenue, First California District, United States of America, First Doe, Second Doe [83] and Third Doe, defendants, Proceeding No. 20473-S", and all papers filed in or motions, proceedings, orders or judgments made, taken, had or entered in said last named action shall be considered and be deemed to have been made, taken, had and entered in each and every one of the above entitled actions for all purposes save and except that in the event of the entry of a judgment in favor of the plaintiff in said action it is understood and agreed that no judgment will be entered in favor of any other plaintiff named in any or all of the above entitled actions in excess of the amount or amounts set forth in the respective stipulation of Facts filed in each respective action or otherwise authorized by law;

2. That whatever judgment may be entered in connection with any Appeal in the proceeding numbered 20473-S shall be applicable, insofar as the law involved is concerned, to each and every one of the above entitled actions, and judgments may and shall be entered therein, respectively, in conformity with

the judgment as to the law in proceeding number 20473-S to the same force and effect as if pronounced separately in a separate appeal, hearing and judgment in each of the above entitled actions;

3. That the filing of a separate Bond on Appeal as otherwise required by law and Rule 73(c) of the Federal Rules of Civil Procedure, upon an appeal being taken in each of the above entitled actions, be and the same is, pursuant to order of court endorsed hereon, dispensed with except in Proceeding No. 20473-S, in which case the Bond on Appeal therein filed shall be in the sum of Two Hundred and Fifty Dollars (\$250.00) and shall be applicable to each and all of the above entitled actions as provided in Rule 73(c) and in lieu of any additional or other Bond [84] on Appeal in any or all of the above entitled actions;

4. That for all purposes all papers, bonds or documents duly filed or introduced in Proceeding Number 20473-S, in connection with the appeal to the Circuit Court of Appeals therein, shall be deemed to have been duly filed or introduced in each of the above entitled actions; and

5. That this Stipulation is made in order to avoid unnecessary expenditure of time and money and the otherwise necessity of separate appeals, multiplicity of bonds, papers, motions, proceedings and judgments in each of the above entitled actions, it being the understanding and agreement that the appeal in proceeding Number 20473-S shall be in lieu and in the place and stead of separate appeals, pro-

ceedings and judgments in each of the above entitled actions yet shall be applicable thereto as if full proceedings on appeal had been entertained in each and every one of the above entitled actions subject only to the reservations herein contained.

ROBERT H. FOUKE

Attorney for Plaintiff and Appellants, California Wineries and Distilleries, Inc., a California Corporation; Fresno Winery Inc., etc.; Santa Lucia Wineries, Inc., a California Corporation; Charles Dubbs and Samuel Caplan, co-partners doing business under the firm name and style of Alta Winery and Distillery; Mount Tivy Winery, Inc., a California Corporation; California Growers Wineries Inc., a California corporation; and St. George Winery, a California Corporation.

FRANK J. HENNESSY

Per W. F. M.,

Attorney for Defendants and Appellees, John V. Lewis and United States of America. [85]

ORDER

Good Cause Appearing Therefor,

It Is Hereby Ordered:

(1) That the foregoing Stipulation be and the same is hereby ratified, confirmed and approved;

(2) That each and all of the above entitled actions be and they are hereby consolidated for all purposes on appeal to the Circuit Court of Appeals for the Ninth Circuit with and in Proceeding Number 20473-S in accordance with and pursuant to the foregoing Stipulation, and that a single Bond on Appeal is hereby fixed in the sum of Two Hundred and Fifty Dollars (\$250.00), as provided in Rule 73(c) of the Federal Rules of Civil Procedure, and shall be filed with the appeal to the Circuit Court of Appeals for the Ninth Circuit in Proceeding Number 20473-S, which Bond on Appeal shall be in lieu and in the place and stead of separate Bonds on Appeal in each of the above entitled actions and shall be applicable thereto for all purposes.

Done in open court this 2nd day of July, 1942.

A. F. ST. SURE

Judge of the District Court.

[Endorsed]: Filed July 3, 1942. [86]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 75(a) of the Rules of Civil Procedure for the District Courts of the United States, the Appellants designate that there be included in the record on appeal the complete record in the action entitled "Mount Tivy Winery, Inc., a California corporation, plaintiff, vs. John V. Lewis, Collector of Internal Revenue, First California District, John Doe, Collector of Internal Revenue, First California District, United States of America, First Doe, Second Doe and Third Doe, defendants, Proceeding No. 20473-S" and all proceedings and evidence in this said action, save and except that the following records therein, namely:

- (1) Memorandum of Defendant's Points and Authorities;
- (2) Memorandum of Defendants John V. Lewis and The United States of America;
- (3) Reply Brief to Memorandums of Defendants' Points and Authorities; and
- (4) Defendants' Closing Brief,

and any other brief of points and authorities, shall be excluded from the record on appeal.

ROBERT H. FOUKE

Attorney for Appellants, California Wineries and Distilleries, Inc., a California corporation; Fresno Winery, Inc., etc.; Santa Lucia Win-

eries Inc., a California corporation; Charles Dubbs and Samuel Caplan, co-partners doing business under the firm name and style of Alta Winery and Distillery; Mount Tivy Winery, Inc., a California corporation; California Growers Wineries Inc., a California corporation; and St. George Winery, a California corporation.

Received copy of the within Designation of Record on Appeal this 3rd day of July, 1942.

FRANK J. HENNESSY
per W F M

Attorney for Defendants and
Appellees John V. Lewis
and United States of America.

[Endorsed]: Filed July 3, 1942. [89]

[Title of District Court and Cause.]

STIPULATION TRANSMITTING ORIGINAL
EXHIBITS AND ORDER APPROVING
SAME

It Is Stipulated by and between counsel for the above entitled parties that the Clerk of this Court, as provided by law and in conformity with Rule 75

of the Rules of Civil Procedure, shall transmit to the clerk of the Circuit Court of Appeals for the Ninth Circuit the following designated portions of the records, proceedings and evidence in this cause, certifying those portions thereof that are necessary to be certified pursuant to said rules or pursuant to the rules of said Circuit Court of Appeals, all of the costs thereof to be paid by the Plaintiff- [90] Appellant; and the original Exhibits forwarded pursuant to Rule 75 (i) shall be held by the clerk of the appellate court pending the appeal and thereafter returned to the clerk of this court;

Copies of the following Exhibits attached to the Stipulation of Facts filed in the above entitled action and designated by Exhibit Number, namely,

List of Exhibits—Mount Tivy Winery, Inc.
Exhibit No.

- “A” Treasury Decision No. 19—Gen'l. Circular No. 141.
- “B” Application for Permit Form 1404.
- “C” Permit to operate—Form 1405.
- “D” Blanket Bond—Form 1530 A.
- “E” Blanket Bond—Form 699 A.
- “F” Monthly Report—Form 702.
- “G” Field Warehouse Storage Agreement.
- “H” Field Warehouse Lease.
- “I” Warehouse Receipt No. 01304.
- “J” Warehouse Receipt No. 01307.
- “K” Warehouse Receipt No. 01312.
- “L” Warehouse Receipt No. 01316.
- “M” Promissory Notes.

- “M-1” Collateral Agreement.
- “N” Order for Warehouse Release.
- “O” A & C Mimeo Coll. No. 4132.
- “P” Mimeo Letter “Floor Tax on Distilled Spirits, Wines, Etc.
- “Q” Inventory & Return—Form 756.
- “R” Letter of Protest.
- “S” Claim in Abatement.
- “T” Claim in Abatement.
- “U” Receipt for payment of Taxes—Form 1.
- “V” Notice and Demand for Tax—Form 17.

It Is Further Stipulated that the Plaintiff-Appellant [91] shall not file two copies of the Reporter's Transcript as provided for in Rule 75(b).

ROBERT H. FOUBE

Attorney for Plaintiff & Appellant.

FRANK J. HENNESSY

per W F M

Attorney for Defendants & Appellees.

It is so ordered.

MICHAEL J. ROCHE

United States District Judge.

Dated: July 10th, 1942.

[Endorsed]: July 10, 1942. [92]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, California Wineries and Distilleries, Inc., a California corporation, Fresno Winery, Inc., a California corporation, (formerly known as Elsinore Winery, Inc., a corporation, and Lucerne Winery, Inc., a corporation,) Santa Lucia Wineries, Inc., a California corporation, Alta Winery and Distillery, a copartnership consisting of Charles Dubbs and Samuel Caplan, copartners, Mount Tivy Winery, Inc., a California corporation, California Growers Wineries, Inc., a California corporation, and St. George Winery, a California corporation, as Principal, and The Western Casualty & Surety Company [94] a corporation organized and existing under the laws of the State of Kansas and authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto John V. Lewis, Collector of Internal Revenue First California District, and United States of America, in the full and just sum of Two Hundred and Fifty and No/100 (\$250.00) Dollars, to be paid to the said John V. Lewis, Collector of Internal Revenue First California District and United States of America, their certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3 day of July, 1942.

Whereas, lately at the District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said Court, between California Wineries and Distilleries, Inc., a California corporation, No. 20464-S, Fresno Winery, Inc., a California corporation, (formerly known as Elsinore Winery, Inc., a corporation, and Lucerne Winery, Inc., a corporation) No. 20465-S, Santa Lucia Wineries, Inc., a California corporation, No. 20466-S, Alta Winery and Distillery, a copartnership consisting of Charles Dubbs and Samuel Caplan, copartners, No. 20467-S, Mount Tivy Winery, Inc., a California corporation, No. 20473-S, California Growers Wineries, Inc., a California corporation, No. 20474-S, and St. George Winery, a California corporation, No. 21113-S, against John V. Lewis, Collector of Internal Revenue First California District and United States of America, judgments were rendered against California Wineries and Distilleries, Inc., a California corporation, Fresno Winery, Inc., a California corporation (formerly known as Elsinore Winery, Inc., a corporation, and Lucerne Winery, Inc., a corporation), Santa Lucia Wineries, Inc., a California corporation, Alta Winery and Distillery, a copartnership consisting of Charles Dubbs and Samuel Caplan, copartners, Mount Tivy Winery, Inc., a California corporation, California Growers Wineries, Inc., a California corporation, and St. George Winery, a

California corporation, and the said plaintiffs above named have each separately filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the State [95] of California.

Now, Therefore, the condition of the above obligation is such, that if the said California Wineries and Distilleries, Inc., a California corporation, Fresno Winery, Inc., a California corporation, Santa Lucia Wineries, Inc., a California corporation, Alta Winery and Distillery, a copartnership consisting of Charles Dubbs and Samuel Caplan, copartners, Mount Tivy Winery, Inc., a California corporation, California Growers Wineries, Inc., a California corporation, and St. George Winery, a California corporation, shall prosecute their appeal to effect, and answer all costs if they fail to make their pleas good, then the above obligation to be void; else to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "consent and agreement" for summary judgment and execution thereon mentioned in Rule #13 of the District Court.

Acknowledged before me the day and year first above written.

CALIFORNIA WINERIES AND
DISTILLERIES, INC.

By CHAS. J. YOUNGBERG

Attorney in fact

FRESNO WINERY, INC.

By CHAS. J. YOUNGBERG

Attorney in fact

Mount Tivy Winery

SANTA LUCIA WINERIES,
INC.

By CHAS. J. YOUNGBERG
Attorney in fact

ALTA WINERY AND DISTIL-
LERY, a copartnership consist-
ing of Charles Dubbs and Sam-
uel Caplan

By CHAS. J. YOUNGBERG
Attorney in fact

MOUNT TIVY WINERY, INC.

By CHAS. J. YOUNGBERG
Attorney in fact [96]
CALIFORNIA GROWERS
WINERIES, INC.

By CHAS. J. YOUNGBERG
Attorney in fact
ST. GEORGE WINERY
By CHAS. J. YOUNGBERG
Attorney in fact

The premium charged for this bond is \$10.00 Dol-
lars per annum.

[Seal] THE WESTERN CASUALTY
& SURETY COMPANY
By M. HENDERSON
Attorney in fact

Examined and recommended for approval as pro-
vided in Rule #13.

ROBERT H. FOUKE,
Attorney

(Duly Verified)

[Endorsed]: Filed Jul 3, 1942. [97]

In the Southern Division of the United States
District Court for the Northern
District of California.

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do certify that the foregoing 97 pages, numbered 1 to 97, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Mount Tivy Winery, Inc. vs. John V. Lewis, etc. et al., Case No. 20473-S as the same now remain on file and of record in my office.

I do hereby further certify that exhibits marked Nos. A to V, both inclusive, were filed in this case, and pursuant to order of court, are herewith forwarded to the United States Circuit Court of Appeals for the Ninth Circuit, to be considered by it as part of the record on appeal herein.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Fourteen and 30/100 (\$14.30) Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 11th day of August, A. D. 1942.

[Seal]

WALTER B. MALING,
Clerk.

By HARRY L. FOUTS,
Deputy Clerk. [98]

[Endorsed]: No. 10220. United States Circuit Court of Appeals for the Ninth Circuit. Mount Tivy Winery, Inc., a Corporation, Appellant, vs. John V. Lewis, Collector of Internal Revenue, First California District, and United States of America, Appellees. California Wineries and Distilleries, Inc., a Corporation, Appellant, vs. John V. Lewis, Collector of Internal Revenue, etc., and United States of America, Appellees. Fresno Winery, Inc., a Corporation, etc., Appellant, vs. John V. Lewis, Collector of Int. Revenue, et al., Appellees. Santa Lucia Wineries, Inc., a Corporation, Appellant, vs. John V. Lewis, Collector of Int. Revenue, et al., Appellees. Charles Dubbs and Samuel Caplan, Co-partners doing business as Alta Winery and Distillery, Appellants, vs. John V. Lewis, Collector of Int. Revenue, et al., Appellees. California Growers Wineries, Inc., a Corporation, Appellant, vs. John V. Lewis, Collector of Int. Revenue, et al., Appellees. St. George Winery, a Corporation, Appellant, vs. John V. Lewis, Collector of Int. Revenue, et al., Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed August 12, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10220

MOUNT TIVY WINERY, INC., a California
Corporation, et als.,

Appellants,

vs.

JOHN V. LEWIS, Collector of Internal Revenue,
First California District, JOHN DOE, Col-
lector of Internal Revenue First California
District, UNITED STATES OF AMERICA,
FIRST DOE, SECOND DOE and THIRD
DOE,

Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY ON
THE APPEAL

In support of its appeal in this proceeding, the appellants will rely upon the following points:

1. Since all the evidence was contained in Stipulations of Fact, and there was no controversy as to the facts, in each of the respective cases consolidated in this appeal, only a question of law was presented to the trial court.
2. The trial court erred as a matter of law in holding that Section 10 (c) of the Liquor Taxing Act of 1934 levies an excise tax.
3. The trial court erred as a matter of law in holding that Section 10 (c) of the Liquor Taxing

Act of 1934 does not violate Art. I, Sec. 2, Cl. 3, and Art. I, Sec. 9, Cl. 4 of the United States Constitution.

4. The trial court erred as a matter of law in holding that Section 10 (c) of The Liquor Taxing Act of 1934 does not violate the Fifth Amendment to the Constitution of the United States.

5. The trial court erred as a matter of law in holding that within the meaning of Section 10 (c) of The Liquor Taxing Act of 1934, 26 USCA 451 (b), 1934 Cumulative Annual Pocket Part, the appellants held the specified quantities of wine set forth in the findings of fact, conclusions of law and respective judgments in each of the cases herein consolidated and appealed.

6. The trial court erred as a matter of law in holding that the appellants intended to sell the wine so stored in bonded storerooms or use it in the manufacture or production of articles intended for sale.

7. The trial court erred as a matter of law in holding that appellants and each of them, was subject to the provisions of said Liquor Taxing Act and was liable for an Internal Revenue Tax in the amount set forth in the findings of fact, conclusions of law and judgments entered in the respective cases before the United States District Court, herein consolidated and appealed.

8. The trial court erred as a matter of law in holding that appellants and each of them was subject to and liable for the respective sums set forth

in the findings of fact, conclusions of law and judgments in interest on the unpaid Internal Revenue taxes under the provisions of Section 10 (c) of the Liquor Taxing Act of 1934, USCA 451 (b), 1934 Cumulative Annual Pocket Part.

9. The trial court erred as a matter of law in holding that the respective sums of principal and interest set forth in the findings of fact, conclusions of law and judgments entered in each of the respective cases before the District Court of Appeals and consolidated in this case on appeal was rightfully and correctly paid and that appellants and each of them was not entitled to its return or any portion thereof.

10. The trial court erred as a matter of law in holding that appellees John V. Lewis and United States of America were entitled to a judgment of dismissal and for costs of suit incurred in said action.

Dated: August 24, 1942.

ROBERT H. FOUKE

Attorney for Appellants.

Received copy of foregoing Statement of Points this 24th day of August, 1942.

FRANK J. HENNESSY,
per WFM

Attorney for Appellees.

[Endorsed]: Filed Aug. 24, 1942.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

In accordance with Rule 19, appellants designate the entire record as necessary for the consideration of this proceeding. In the Court below, appellants have designated the complete record for inclusion, in accordance with Rule 75 (a) of the Federal Rules of Civil Procedure, excluding the Memorandum of Legal Points and Authorities therefrom, as set forth in said Designation of Record on Appeal filed July 3, 1942 in said Court.

In this Court, appellants designate and respectfully request the printing of the Transcript of Record on Appeal, prepared by the Clerk of the District Court, excluding therefrom certain voluminous exhibits which, pursuant to Stipulation and Order dated the 21st day of August, 1942, are authorized to be incorporated by reference but eliminated from the printed record.

Dated: August 24, 1942.

ROBERT H. FOUKE

Attorney for Appellants.

Received copy of foregoing Designation this 24th day of August, 1942.

FRANK J. HENNESSY

per WFM

Attorney for Appellees

[Endorsed]: Filed Aug. 24, 1942.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER THAT CERTAIN
VOLUMINOUS EXHIBITS NEED NOT BE
COPIED IN THE RECORD BUT MAY BE
INCORPORATED BY REFERENCE

It Is Hereby Stipulated with the approval of the Court, by counsel for the respective parties herein, that in addition to the record on appeal heretofore agreed upon, the hereinafter enumerated original exhibits, which were introduced pursuant to stipulation at the trial of the above entitled cause, and which said exhibits now constitute a part of the record on appeal, may be incorporated in and made a part of the appeal by reference only without the necessity of printing such exhibits, said exhibits being specifically enumerated as follows:

List of Exhibits—
Mount Tivy Winery, Inc.

Exhibit No.

- “A” Treasury Decision No. 19—Gen'l. Circular No. 141
- “B” Application for Permit—Form 1404
- “C” Permit to Operate—Form 1405
- “D” Blanket Bond—Form 1530A
- “E” Blanket Bond—Form 699A
- “F” Monthly Report—Form 702
- “G” Field Warehouse Storage Agreement
- “H” Field Warehouse Lease
- “I” Warehouse Receipt No. 01304

- “J” Warehouse Receipt No. 01307
- “K” Warehouse Receipt No. 01312
- “L” Warehouse Receipt No. 01316
- “M” Promissory Notes
- “M-1” Collateral Agreement
- “N” Order for Warehouse Release
- “O” A & C Mimeo Coll. No. 4132
- “P” Mimeo Letter “Floor Tax on Distilled Spirits, Wines, Etc.
- “Q” Inventory & Return—Form 756.
- “R” Letter of Protest
- “S” Claim in Abatement
- “T” Claim in Abatement
- “U” Receipt for payment of Taxes—Form 1.
- “V” Notice and Demand for Tax—Form 17.

It Is Further Stipulated with the approval of the Court that the above described Exhibits may be used as physical exhibits, neither printed in a book of Exhibits nor the Transcript as such Exhibits are bulky in nature and do not lend themselves to satisfactory and convenient or economic reproduction in printed form.

Dated this 21st day of August, 1942.

ROBERT H. FOUKE

Attorney for Appellants.

FRANK J. HENNESSY

per WFM

Attorney for Appellees.

It Is So Ordered this 23 day of August, 1942,
provided three copies of the exhibits in plain and
clear typing or photostats are furnished the court.

WILLIAM DENMAN

Judge of the United States
Circuit Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed Aug. 24, 1942.

